



November 12, 2021

FILED VIA PACFILE

Michael Krimmel, Esq.
Prothonotary
Commonwealth Court of Pennsylvania
Pennsylvania Judicial Center
601 Commonwealth Avenue, Suite 2100
Harrisburg, PA 17106-2575

RE: Submission of Record in:
Pennsylvania Department of Health v. Ed Mahon and Spotlight PA,
No. 1066 CD 2021

Dear Mr. Krimmel:

We hereby submit the record in the above-referenced matter. Section 1303 of the Right-to-Know Law, 65 P.S. §§ 67.101, *et seq.*, (“RTKL”), defines the Record on Appeal as “the record before a court shall consist of the request, the agency’s response, the appeal filed under section 1101, the hearing transcript, if any, and the final written determination of the appeals officer.” Pursuant to *Department of Transportation v. Office of Open Records*, 7 A.3d 329 (Pa. Commw. Ct. 2010), this record includes all “evidence and documents admitted into evidence by the appeals officer pursuant to Section 1102(a)(2).” The record in this matter consists of the following:

Office of Open Records Docket No. 2021-1296:

1. The appeal filed by Ed Mahon and Spotlight PA (“Requester”) to the Office of Open Records (“OOR”), received July 1, 2021.
2. Official Notice of Appeal dated July 2, 2021, sent to both parties by the OOR, advising them of the docket number and identifying the appeals officer for the matter.
3. Email chain dated July 20, 2021 through July 21, 2021, wherein Requester and Appeals Officer agree to a one-week extension to provide submissions and an extension of time for the OOR to issue the Final Determination.
4. Requester’s submission dated July 30, 2021.
5. Pennsylvania Department of Health’s (“Department”) submission dated July 30, 2021.

6. Email chain dated July 30, 2021, between Requester and Appeals Officer, wherein Requester asks for a week to review and respond to the Department's submission. A new briefing schedule is agreed upon allowing time for the Department to respond to the Requester's response.
7. Requester's submission dated July 30, 2021.
8. Requester's reply dated August 6, 2021 to Department's July 30, 2021 submission.
9. Email chain dated August 20, 2021 through August 23, 2021 confirming the Department did not submit a supplemental response to the Requester's submission dated August 6, 2021.
10. Final Determination issued by the OOR on September 2, 2021.

The OOR has discretion to hold a hearing on appeals filed but chose not to do so in this matter. Therefore, there is no transcript to transmit. Certification of the record in this case is attached to this letter. Please feel free to contact us for any reason in connection with this matter.

Sincerely,



Kyle Applegate
Chief Counsel

Attachments

cc: See certificate of service

Commonwealth of Pennsylvania

Agency Docket Number: AP 2021-1296

Appellate Court Docket Number: 1066 CD 2021

I, Elizabeth Wagenseller, certify that the accompanying electronically transmitted materials are true and correct copies of all materials filed in the Office of Open Records and constitute the record for :

Pennsylvania Department
of Health,
Petitioner

v.

Ed Mahon and Spotlight PA
(Office of Open Records),
Respondents

/s/ Elizabeth Wagenseller

11/12/2021

Executive Director

Volumes:

Agency Record (2)

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

PENNSYLVANIA DEPARTMENT
OF HEALTH

Petitioner,

v.

ED MAHON and SPOTLIGHT PA,
Respondent.

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:

No. 1066 CD 2021

CERTIFIED RECORD

Kyle Applegate
Chief Counsel
Commonwealth of Pennsylvania
Office of Open Records
333 Market Street, 16th Floor
Harrisburg, PA 17101-2334
Phone: (717) 346-9903
Fax: (717) 425-5343
Email: kyapplegat@pa.gov

November 12, 2021

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

PENNSYLVANIA DEPARTMENT
OF HEALTH

Petitioner,

v.

ED MAHON and SPOTLIGHT PA,
Respondent.

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No. 1066 CD 2021

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the Certified Record upon the following by Email at the email listed below:

Yvette M. Kostelac, Esquire
Kevin Hoffman, Esquire
Anna LaMano, Esquire
Commonwealth of Pennsylvania
Health Department
Office of Legal Counsel
825 Health and Welfare Building
625 Forster Street
Harrisburg, PA 17120
kjhoffman@pa.gov
ykostelac@pa.gov
alamano@pa.gov

Paula Knudsen Burke, Esquire
Reporters Committee for
Freedom of the Press
PO Box 1328
Lancaster, PA 17608-1328
pknudsen@rcfp.org

Ed Mahon
Spotlight PA
2433 Wharton Road
East York, PA 17402
emahon@spotlightpa.org



Michele K. Grant, Administrative Officer
Office of Open Records
333 Market Street, 16th Floor
Harrisburg, PA 17101-2234
Phone: (717) 346-9903
Fax: (717) 425-5343
Email: mkuser@pa.gov

Dated: November 12, 2021

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

PENNSYLVANIA DEPARTMENT OF HEALTH	:	
Petitioner,	:	
v.	:	No. 1066 CD 2021
ED MAHON and SPOTLIGHT PA,	:	
Respondent.	:	

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RECORD**

Ed Mahon and Spotlight PA v. Pennsylvania Department of Health,
OOR Dkt. AP 2021-1296

Office of Open Records Docket No. 2021-1296:

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OOR EXHIBIT 1

DC, OpenRecords

From: no-reply@openrecordspennsylvania.com
Sent: Thursday, July 1, 2021 10:10 PM
To: Mahon, Ed
Subject: [External] PA Office of Open Records - Appeal Confirmation

ATTENTION: This email message is from an external sender. Do not open links or attachments from unknown sources. To report suspicious email, forward the message as an attachment to CWOPA_SPAM@pa.gov.



You have filed an appeal of an agency's response to a request for records under the Right-to-Know Law.

Name:	Ed Mahon
Company:	Spotlight PA
Address 1:	2433 Wharton Rd
Address 2:	
City:	East York
State:	Pennsylvania
Zip:	17402
Phone:	717-421-2518
Email:	emahon@spotlightpa.org
Agency (typed):	Lisa Keefer
Agency Address 1:	625 Forster Street
Agency Address 2:	825 Health and Welfare Building
Agency City:	Harrisburg
Agency State:	Pennsylvania
Agency Zip:	
Agency Phone:	717-783-2500
Agency Email:	likeefer@pa.gov

Records at Issue in this Appeal:	Aggregate data for the number of medical marijuana certifications for each of the eligible qualifying conditions in the state's medical marijuana program, as well as written policies and procedures for tracking that information.
Request Submitted to Agency Via:	e-mail
Request Date:	06/15/2021
Response Date:	07/23/2021
Deemed Denied:	No
Agency Open Records Officer:	Lisa M. Keefer
Attached a copy of my request for records:	Yes
Attached a copy of all responses from the Agency regarding my request:	Yes
Attached any letters or notices extending the Agency's time to respond to my request:	Yes
Agree to permit the OOR additional time to issue a final determination:	No
Interested in resolving this issue through OOR mediation:	Yes
Attachments:	<ul style="list-style-type: none"> • DOH-RTKL-MM-022-2021 Mahon Final Response.pdf • rtk_doh_ed_mahon.pdf

I requested the listed records from the Agency named above. By submitting this form, I am appealing the Agency's denial, partial denial, or deemed denial because the requested records are public records in the possession, custody or control of the Agency; the records do not qualify for any exemptions under § 708 of the RTKL, are not protected by a privilege, and are not exempt under any Federal or State law or regulation; and the request was sufficiently specific.



June 23, 2021

Ed Mahon
Spotlight PA
2433 Wharton Road
York, PA 17402

emahon@spotlightpa.org

**RE: Right to Know Law Request
DOH-RTKL-MM-022-2021**

Dear Mr. Mahon:

This letter acknowledges receipt by the Pennsylvania Department of Health (Department) of your written requests for records under the Pennsylvania Right-to-Know Law (RTKL), 65 P.S. §§ 67.101-67.3104. I received your request on June 15, 2021. You requested:

1. Aggregate data for the number of medical marijuana certification issues for each of the eligible qualifying conditions. As of June 15, 2021, the Department of Health website describes the following:

Only patients suffering from one of the following medical conditions can participate in Pennsylvania's medical marijuana program:

- Amyotrophic lateral sclerosis.
- Anxiety disorders.
- Autism.
- Cancer, including remission therapy.
- Crohn's disease.
- Damage to the nervous tissue of the central nervous system (brain-spinal cord) with objective neurological indication of intractable spasticity, and other associated neuropathies.
- Dyskinetic and spastic movement disorders.
- Epilepsy.
- Glaucoma.
- HIV / AIDS.
- Huntington's disease.
- Inflammatory bowel disease.
- Intractable seizures.
- Multiple sclerosis.

- Neurodegenerative diseases.
 - Neuropathies.
 - Opioid use disorder for which conventional therapeutic interventions are contraindicated or ineffective, or for which adjunctive therapy is indicated in combination with primary therapeutic interventions.
 - Parkinson's disease.
 - Post-traumatic stress disorder.
 - Severe chronic or intractable pain of neuropathic origin or severe chronic or intractable pain.
 - Sickle cell anemia.
 - Terminal illness.
 - Tourette syndrome.
2. Any written policies or procedures describing how the Department of Health tracks the use of its medical marijuana program, including which qualifying conditions are certified. The Department of Health press office in a June 11 email indicated that it does track some of this information.

Your request is denied. The records in paragraph 1 are confidential under Section 702 of the Medical Marijuana Act, 35 P.S. § 10231.302(a). Patient information--The department shall maintain a confidential list of patients and caregivers to whom it has issued identification cards. All information obtained by the department relating to patients, caregivers and other applicants shall be confidential and not subject to public disclosure, including disclosure under the RTKL.

With regard to paragraph 2 of your request, the Department conducted a search for records, and I have been advised that no records exist within the Department responsive to your RTKL request, as there are no written policies or procedures describing how the Department tracks use of the Medical Marijuana program.

If you choose to appeal under the RTKL, your appeal should be submitted in writing to: Executive Director, OOR, 333 Market Street, 16th Floor, Harrisburg, Pennsylvania 17101. If you choose to file an appeal you must do so within 15 business days of the mailing date of this response and send to the OOR:

- 1) This response;
- 2) Your request;
- 3) The reasons why you think the agency is wrong in denying access to the requested records.

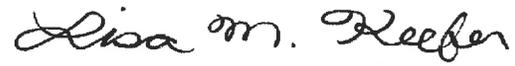
The OOR has an appeal form available on the OOR website at:

<https://www.openrecords.pa.gov/Appeals/AppealForm.cfm>.

June 23, 2021

Please be advised that this correspondence will serve to close this record with our office as permitted by law.

Sincerely,

A handwritten signature in black ink that reads "Lisa M. Keefer". The signature is written in a cursive style with a loop at the end of the last name.

Lisa M. Keefer
Agency Open Records Officer
Pennsylvania Department of Health
625 Forster Street
825 Health and Welfare Building
Harrisburg, PA 17120-0701

Date of Mailing: 06/23/2021

7/1/2021

Philadelphia Inquirer Mail - Attention: Agency Open Records Officer



Mahon, Ed <emahon@spotlightpa.org>

Attention: Agency Open Records Officer

1 message

Mahon, Ed <emahon@spotlightpa.org>
To: PADOHRTK <PADOHRTK@pa.gov>

Tue, Jun 15, 2021 at 8:48 AM

Standard Right-to-Know Law Request Form

Good communication is vital in the RTKL process. Complete this form thoroughly and retain a copy; it is required should an appeal be necessary. You have 15 business days to appeal after a request is denied or deemed denied.

SUBMITTED TO AGENCY NAME: Pennsylvania Department of Health
Date of Request: June 15, 2021 **Submitted via:** Email

PERSON MAKING REQUEST:

Name: Ed Mahon

Company (if applicable): Spotlight PA

Mailing Address:

2433 Wharton Road

City: York, PA 17402 **Email:** emahon@spotlightpa.org

Telephone: 717-421-2518

How do you prefer to be contacted if the agency has questions? Email ; phone

RECORDS REQUESTED: Be clear and concise. Provide as much specific detail as possible, ideally including subject matter, time frame, and type of record or party names. Use additional sheets if necessary. RTKL requests should seek records, not ask questions. Requesters are not required to explain why the records are sought or the intended use of the records unless otherwise required by law.

<https://mail.google.com/mail/u/1?ik=39d44582bd&view=pt&search=all&permthid=thread-a%3Ar54669135405099840&simpl=msg-a%3Ar-3452353598738538243>

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7/1/2021

Philadelphia Inquirer Mail - Attention: Agency Open Records Officer

1. Aggregate data for the number of medical marijuana certification issues for each of the eligible qualifying conditions. As of June 15, 2021, the Department of Health website describes the following:

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- Inflammatory bowel disease.
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- Neurodegenerative diseases.
- Neuropathies.
- Opioid use disorder for which conventional therapeutic interventions are contraindicated or ineffective, or for which adjunctive therapy is indicated in combination with primary therapeutic interventions.
- Parkinson's disease.
- Post-traumatic stress disorder.

<https://mail.google.com/mail/u/1/?ik=39d44582bd&view=pt&search=all&permthid=thread-a%3Ar54669135405099840&simpl=msg-a%3Ar-3452353598738538243>

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7/1/2021

Philadelphia Inquirer Mail - Attention: Agency Open Records Officer

- Severe chronic or intractable pain of neuropathic origin or severe chronic or intractable pain.
- Sickle cell anemia.
- Terminal illness.
- Tourette syndrome.

2. Any written policies or procedures describing how the Department of Health tracks the use of its medical marijuana program, including which qualifying conditions are certified. The Department of Health press office in a June 11 email indicated that it does track some of this information.

Last February, the department enhanced the reporting services in order to provide meeting transcripts. Transcripts for events taken place before then are not available. An from the press office email, RA-DHPRESSOFFICE@pa.gov, said the following:

Good morning Ed,

Last February, the department enhanced the reporting services in order to provide meeting transcripts. Transcripts for events taken place before then are not available.

Regarding your most recent inquiry, see below:

1. Currently there are 548,468 Patients registered to date and now 349,272 active certifications.

2 and 3: We cannot share specifics regarding patient use. However, we can share that the top three serious medical conditions are remain to be chronic pain, anxiety and PTSD.

Thanks,

Maggi

DO YOU WANT COPIES? Yes, electronic copies preferred if available, and in a database if available.

Do you want certified copies? Yes (may be subject to additional costs) No

RTKL requests may require payment or prepayment of fees. See the Official RTKL Fee Schedule for more details.

Please notify me if fees associated with this request will be more than \$50.

<https://mail.google.com/mail/u/1?ik=39d44582bd&view=pt&search=all&permthid=thread-a%3Ar54669135405099840&siml=msg-a%3Ar-3452353598738538243>

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7/1/2021

Philadelphia Inquirer Mail - Attention: Agency Open Records Officer

ITEMS BELOW THIS LINE FOR AGENCY USE ONLY

Tracking: _____ Date Received: _____ Response Due (5 bus. days): _____

30-Day Ext.? Yes No (If Yes, Final Due Date: _____) Actual Response Date: _____

Request was: Granted Partially Granted & Denied Denied Cost to Requester: \$ _____

Appropriate third parties notified and given an opportunity to object to the release of requested records.

Ed Mahon
Reporter
Cell: 717-421-2518
he/him/his
www.spotlightpa.org



A collaborative newsroom producing
investigative journalism for Pennsylvania.

OOR EXHIBIT 2

NOTICE RELATED TO THE CORONAVIRUS (COVID-19) EMERGENCY

Pennsylvania is currently under a declared state of emergency related to the coronavirus (COVID-19). Some agencies and requesters may face challenges in regard to their ability to meaningfully participate in Right-to-Know Law (RTKL) appeals. Accordingly, and to ensure due process, the Office of Open Records (OOR) is taking the following temporary steps.

The timeline for this RTKL appeal may be extended by the OOR during the appeal. This extension will allow the OOR the flexibility it requires to protect due process and to ensure that the agency and requester, along with any third parties, have a full and fair opportunity to meaningfully participate in the appeal.

The appeal has been docketed by the OOR and it has been assigned to an Appeals Officer. The docket number and the Appeals Officer's contact information are included in the attachments you received along with this notice.

The Final Determination is currently due on **August 12, 2021**.

Evidence, legal argument and general information to support your position must be submitted within seven (7) business days from the date of this letter, unless the Appeals Officer informs you otherwise. *Note: If the proceedings have been stayed for the parties to submit a completed mediation agreement, the record will remain open for seven (7) business days beyond the mediation agreement submission deadline.*

Submissions in this case are currently due on **July 23, 2021**.

If you are unable to meaningfully participate in this appeal under the above deadlines, please notify the Appeals Officer as soon as possible.

Every staff member of the OOR is working remotely, and we are only able to receive postal mail on a limited basis at this time. Accordingly, we urge agencies and requesters to use email for all communication with the OOR at this time.

If you have any questions about this notice or the underlying appeal, please contact the Appeals Officer. The OOR is committed to working with agencies and requesters during this time to ensure that the RTKL appeal process proceeds as fairly and as smoothly as possible.



July 2, 2021

Via Email Only:

Mr. Ed Mahon
Spotlight PA
2433 Wharton Rd
East York, PA 17402
emahon@spotlightpa.org

Via Email Only:

Lisa M. Keefer
Agency Open Records Officer
Pennsylvania Department of Health
625 Forster Street
825 Health and Welfare Building
Harrisburg, PA 17120
PADOHRTK@pa.gov
likeefer@pa.gov

RE: OFFICIAL NOTICE OF APPEAL - Mahon and Spotlight PA v. Pennsylvania Department of Health OOR Dkt. AP 2021-1296

Dear Parties:

Review this information and all enclosures carefully as they affect your legal rights.

The Office of Open Records (“OOR”) received this appeal under the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101, et seq. on July 1, 2021. A binding Final Determination (“FD”) will be issued pursuant to the timeline required by the RTKL, **subject to the enclosed information regarding the coronavirus (COVID-19).**

Notes for both parties (more information in the enclosed documents):

- The docket number above must be included on all submissions related to this appeal.
- Any information provided to the OOR must be provided to all parties involved in this appeal. Information that is not shared with all parties will not be considered.
- All submissions to the OOR, other than *in camera* records, will be public records. Do not include any sensitive information- such as Social Security numbers.

If you have questions about this appeal, please contact the assigned Appeals Officer (contact information enclosed), providing a copy of any correspondence to all parties involved in this appeal.

Sincerely,

Elizabeth Wagenseller
Executive Director

Enc.: Description of RTKL appeal process
Assigned Appeals Officer contact information
Entire appeal as filed with OOR

The Right-to-Know Law Appeal Process

Please review this information carefully as it affects your legal rights.

The Office of Open Records (“OOR”) has received the enclosed appeal, which was filed under the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101, et seq. A binding Final Determination will be issued by the OOR pursuant to the statutory timeline, subject to the enclosed information regarding the coronavirus (COVID-19). If you have any questions, please contact the Appeals Officer assigned to this case. Contact information is included on the enclosed documents.

Submissions to the OOR Both parties may submit evidence, legal argument, and general information to support their positions to the assigned Appeals Officer. Please contact the Appeals Officer as soon as possible.

Any information provided to the OOR must be provided to all parties involved in this appeal. Information submitted to the OOR will not be considered unless it is also shared with all parties.

Include the docket number on all submissions.

The agency may assert exemptions on appeal even if it did not assert them when the request was denied (*Levy v. Senate of Pa.*, 65 A.3d 361 (Pa. 2013)).

Generally, submissions to the OOR — other than *in camera* records — will be public records. Do not include sensitive or personal information, such as Social Security numbers, on any submissions.

Agency Must Notify Third Parties

If records affect a legal or security interest of a third party; contain confidential, proprietary or trademarked records; or are held by a contractor or vendor, **the agency must notify such parties of this appeal immediately and provide proof of that notice by the record closing date set forth above.**

Such notice must be made by: (1) Providing a copy of all documents included with this letter; **and** (2) Advising relevant third parties that interested persons may request to participate in this appeal by contacting the Appeals Officer assigned to this case (see 65 P.S. Â§ 67.1101(c)).

The Commonwealth Court has held that “the burden [is] on third-party contractors... to prove by a preponderance of the evidence that the [requested] records are exempt.” (*Allegheny County Dep't of Admin. Servs. v. A Second Chance, Inc.*, 13 A.3d 1025, 1042 (Pa. Commw. Ct. 2011)).

A third party's failure to participate in a RTKL appeal before the OOR may be construed as a waiver of objections regarding release of requested records.

NOTE TO AGENCIES: If you have questions about this requirement, please contact the Appeals Officer immediately.

Statements of Fact & Burden of Proof

Statements of fact **must** be supported by an affidavit or attestation made under penalty of perjury by a person with actual knowledge. Statements of fact or allegations submitted without an affidavit may not be considered.

Under the RTKL, the agency has the burden of proving that records are exempt from public access (see 65 P.S. § 67.708(a)(1)). **To meet this burden, the agency must provide evidence to the OOR.**

The law requires the agency position to be supported by sufficient facts and citation to all relevant sections of the RTKL, case law, and OOR Final Determinations.

An affidavit or attestation is required to prove that records do not exist.

Sample affidavits are on the OOR website, openrecords.pa.gov.

Any evidence or legal arguments not submitted or made to the OOR may be waived.

Preserving Responsive Records

The agency must preserve all potentially responsive records during the RTKL appeal process, including all proceedings before the OOR and any subsequent appeals to court.

Failure to properly preserve records may result in the agency being sanctioned by a court for acting in bad faith.

See *Lockwood v. City of Scranton*, 2019-CV-3668 (Lackawanna County Court of Common Pleas), holding that an agency had “a mandatory duty” to preserve records after receiving a RTKL request. Also see generally *Uniontown Newspapers, Inc. v. Pa. Dep’t of Corr.*, 185 A.3d 1161 (Pa. Commw. Ct. 2018), holding that “a fee award holds an agency accountable for its conduct during the RTKL process...”

Mediation

The OOR offers a mediation program as an alternative to the standard appeal process. To participate in the mediation program, both parties must agree in writing.

The agency must preserve all potentially responsive records during the RTKL appeal process. Mediation is a voluntary, informal process to help parties reach a mutually agreeable settlement. The OOR has had great success in mediating RTKL cases.

If mediation is successful, the requester will withdraw the appeal. This ensures that the case will not proceed to court — saving both sides time and money.

Either party can end mediation at any time.

If mediation is unsuccessful, both parties will be able to make submissions to the OOR as outlined on this document, and the OOR will have no less than 30 calendar days from the conclusion of the mediation process to issue a Final Determination.

Parties are encouraged to consider the OOR's mediation program as an alternative way to resolve disputes under the RTKL.



MEDIATION NOTICE

Appeals before the Office of Open Records (OOR) are stayed for seven business days pending the parties' decision to participate in the OOR's Informal Mediation Program.

The Parties may agree to mediation. To participate in mediation, the Parties must submit a completed copy of the attached Mediation Agreement. If both Parties agree to mediation, the appeal will be further stayed, and the Parties will be contacted by an OOR Mediator to begin the mediation process.

The Parties may decline mediation. If either Party declines to participate in mediation or fails to submit a signed Mediation Agreement within seven business days:

- The record will remain open for seven additional business days for the parties to submit evidence and argument in support of their positions; and
- The OOR will decide the appeal and issue a Final Determination by the date set forth in the attached Official Notice of Appeal.

Even if mediation is declined at this time, the Parties may agree to mediate the dispute at any time prior to a Final Determination being issued, and the appeal will be stayed pending mediation.

Questions. If the Parties have questions about mediation or what to expect during the mediation process, please email the assigned Appeals Officer or visit the OOR's website at <https://www.openrecords.pa.gov/Appeals/Mediation.cfm>.



pennsylvania

OFFICE OF OPEN RECORDS

OOB MEDIATION AGREEMENT

OOB Dkt. No. 2021-1296

Requester Name: Mahon, Ed

Agency Name: Pennsylvania Department of Health

The Requester and Agency (collectively, the "Parties") agree to participate in the OOR's Informal Mediation Program to resolve the matters at issue in this appeal.

The Parties agree to participate in the mediation process in good faith. If the Parties agree, there may be more than one session if the Mediator determines that the appeal could be resolved. The Parties acknowledge that mediation sessions are not open to the public and the content of discussions during mediation is confidential and not admissible as evidence in this appeal.

The Parties agree to extend the Final Determination deadline in this appeal for 30 calendar days beyond the conclusion of the mediation process or, if the Requester agreed to grant the OOR a 30-day extension on the appeal form initiating this appeal, the Final Determination deadline will include that extension. If the Requester does not withdraw the appeal, the Mediator will indicate the conclusion of the mediation process in writing if further mediation sessions are not likely to result in a resolution of the dispute. The Parties acknowledge that this Mediation Agreement, the Requester's withdrawal, and the OOR's withdrawal acknowledgement will be included in the OOR's administrative appeal file and subject to public access.

Upon receipt of this completed Mediation Agreement, a Mediator will contact the Parties to establish a mutually convenient date, time and location to conduct a joint mediation session.

Requester Signature: _____ Date: _____

Agency Representative Signature: _____ Date: _____



pennsylvania
OFFICE OF OPEN RECORDS

APPEALS OFFICER:

Kelly Isenberg, Esq.

CONTACT INFORMATION:

Commonwealth of Pennsylvania
Office of Open Records
333 Market Street, 16th Floor
Harrisburg, PA 17101-2234

FACSIMILE:

(717) 425-5343

EMAIL:

kisenberg@pa.gov

**Preferred method of contact and
submission of information:**

EMAIL

**Please direct submissions and correspondence related to this appeal to the above Appeals Officer.
Please include the case name and docket number on all submissions.**

**You must copy the other party on everything you submit to the OOR. The Appeals Officer cannot
speak to parties individually without the participation of the other party.**

The OOR website, <https://openrecords.pa.gov>, is searchable and both parties are encouraged to review
prior final determinations involving similar records and fees that may impact this appeal.

The OOR website also provides sample forms that may be helpful during the appeals process. OOR staff
are also available to provide general information about the appeals process by calling (717) 346-9903.

REQUEST TO PARTICIPATE BEFORE THE OOR

Please accept this as a Request to Participate in a currently pending appeal before the Office of Open Records. The statements made herein and in any attachments are true and correct to the best of my knowledge, information and belief. I understand this statement is made subject to the penalties of 18 Pa.C.S. § 4904, relating to unsworn falsifications to authorities.

NOTE: The requester filing the appeal with the OOR is a named party in the proceeding and is NOT required to complete this form.

OOR Docket No: _____

Today's date: _____

Name: _____

PUBLIC RECORD NOTICE: ALL FILINGS WITH THE OOR WILL BE PUBLIC RECORDS AND SUBJECT TO PUBLIC ACCESS WITH LIMITED EXCEPTION. IF YOU DO NOT WANT TO INCLUDE PERSONAL CONTACT INFORMATION IN A PUBLICLY ACCESSIBLE RECORD, PLEASE PROVIDE ALTERNATE CONTACT INFORMATION IN ORDER TO RECEIVE FUTURE CORRESPONDENCE RELATED TO THIS APPEAL.

Address/City/State/Zip _____

E-mail _____

Fax Number: _____

Name of Requester: _____

Address/City/State/Zip _____

Telephone/Fax Number: _____ / _____

E-mail _____

Name of Agency: _____

Address/City/State/Zip _____

Telephone/Fax Number: _____ / _____

E-mail _____

Record at issue: _____

I have a direct interest in the record(s) at issue as (check all that apply):

- An employee of the agency
- The owner of a record containing confidential or proprietary information or trademarked records
- A contractor or vendor
- Other: (attach additional pages if necessary) _____

I have attached a copy of all evidence and arguments I wish to submit in support of my position.

Respectfully submitted, _____ (must be signed)

Please submit this form to the Appeals Officer assigned to the appeal. Remember to copy all parties on this correspondence. The Office of Open Records will not consider direct interest filings submitted after a Final Determination has been issued in the appeal.

OOR EXHIBIT 3

Isenberg, Kelly

From: Isenberg, Kelly
Sent: Wednesday, July 21, 2021 9:07 AM
To: Mahon, Ed
Cc: DC, OpenRecords; PADOHRTK; Keefer, Lisa
Subject: RE: [External] Re: Corrected: Mahon v. DOH: AP 2021-1296

Tracking:	Recipient	Delivery
	Mahon, Ed	
	DC, OpenRecords	Delivered: 7/21/2021 9:07 AM
	PADOHRTK	Delivered: 7/21/2021 9:07 AM
	Keefer, Lisa	Delivered: 7/21/2021 9:07 AM

Mr. Mahon:

Thank you for your quick response. This email will confirm that the record will remain open for all parties until July 30, 2021, and that the Final Determination deadline will be August 19, 2021. The docket will be amended to reflect the new dates.

Regards,
Kelly Isenberg



Kelly C. Isenberg | Attorney
Appeals Officer
Office of Open Records
333 Market Street, 16th Floor
Harrisburg, PA 17101-2234
Phone: (717) 346-9903
Fax: (717) 425-5343
<https://www.openrecords.pa.gov>
@OpenRecordsPA

From: Mahon, Ed <emahon@spotlightpa.org>
Sent: Tuesday, July 20, 2021 4:51 PM
To: Isenberg, Kelly <kisenberg@pa.gov>
Cc: DC, OpenRecords <RA-OpenRecords@pa.gov>; PADOHRTK <PADOHRTK@pa.gov>; Keefer, Lisa <likeefer@pa.gov>
Subject: Re: [External] Re: Corrected: Mahon v. DOH: AP 2021-1296

I agree to that extension for a final determination by Aug. 19. Thank you!

On Tue, Jul 20, 2021 at 4:37 PM Isenberg, Kelly <kisenberg@pa.gov> wrote:

Mr. Mahon:

I am confirming receipt of your request for an extension. We are amenable to the extension; however, because the Final Determination is currently due on Aug. 12th, we request a corresponding extension of time to issue the Final Determination until Aug. 19, 2021.

Kindly reply whether you are amenable to our request. Feel free to contact me with any questions.

Regards,

Kelly Isenberg



Kelly C. Isenberg | Attorney

Appeals Officer

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@OpenRecordsPA

From: Mahon, Ed <emahon@spotlightpa.org>
Sent: Tuesday, July 20, 2021 4:17 PM
To: DC, OpenRecords <RA-OpenRecords@pa.gov>
Cc: PADOHRTK <PADOHRTK@pa.gov>; Keefer, Lisa <likeefer@pa.gov>; Isenberg, Kelly <kisenberg@pa.gov>
Subject: [External] Re: Corrected: Mahon v. DOH: AP 2021-1296

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Hello: I am emailing to request a one-week extension to provide submissions in this case. I have been called to report to jury duty this week in York County. I reported in person on Monday. I was "on call" today. But I have to report back in person at 9 a.m. Wednesday. I could be unavailable for the rest of the week. I've included an email notification.

I am requesting an extension until Friday, July 30.

Thank you.

On Fri, Jul 2, 2021 at 1:27 PM DC, OpenRecords <RA-OpenRecords@pa.gov> wrote:

Dear Parties,

My apologies for the confusion. The correct appeals officer is copied here.

Attached, find an appeal that has been filed with the Office of Open Records. The above mentioned matter has been assigned to Appeals Officer Kelly Isenberg (refer to the attachment for contact information). Please forward all future correspondence directly to the Appeals Officer (cc'd on this email) and all other parties.

Sincerely,



Dylan Devenyi
Administrative Officer
Office of Open Records
333 Market Street, 16th Floor

Harrisburg, PA 17101-2234

(717) 346-9903 | **Fax** (717) 425-5343

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--

Ed Mahon
Reporter
Cell: 717-421-2518
he/him/his
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--

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OOB EXHIBIT 4

Isenberg, Kelly

From: Mahon, Ed <emahon@spotlightpa.org>
Sent: Friday, July 30, 2021 12:57 PM
To: Isenberg, Kelly
Cc: DC, OpenRecords; PADOHRTK; Keefer, Lisa
Subject: Re: [External] Re: Corrected: Mahon v. DOH: AP 2021-1296
Attachments: 2021-1061_Finnerty-DOH_FD.pdf; In one month, 3,000 Pennsylvanians with anxiety certified for medical marijuana _ Pennsylvania Capital-Star.pdf; Meeting Minutes Aug. 14, 2019.pdf; Medical Marijuana Program Celebrates Five-Year Anniversary, Continues Commitment to Patients in Pennsylvania.pdf; Email.pdf

Hello: As the deadline is July 30, 2021, for the following case (Mahon and Spotlight PA v. Pennsylvania Department of Health OOR Dkt. AP 2021-1296.) I'll be providing some information.

1.) I have attached a recent decision from the Office of Open Records that deals with substantially similar issues. That request sought aggregate data as does mine. I'm asking you to consider the entire order, specifically the following statement:

"Finding the requested aggregated data to be confidential would lead to an absurd result. Under such a broad reading of confidentiality, information such as the total number of Pennsylvanians using the medical marijuana program would be confidential and disclosure of that figure could result in criminal sanctions. The OOR cannot conclude that this was the General Assembly's intent. Instead, based upon the context set forth in Section 302 of the Medical Marijuana Act, the requested information is subject to public access." (Page 6 of attachment 2021-1061_Finnerty-DOH_FD.pdf)

2.) Please also consider this May 2019 news article in which a department official released aggregate data on patients with anxiety disorder certified for cannabis:

<https://www.penncapital-star.com/blog/in-one-month-3000-pennsylvanians-with-anxiety-certified-for-medical-marijuana/>

Attachment ("In one month, 3,000 Pennsylvanians...")

3.) I've also included meeting minutes provided by the department from that August 2019 meeting. On page 27-28, a state employee provides totals on patients certified for anxiety disorders. "As a result of that, during the first 21 certification period, which was just the first four 22 days after approval, 212 patients were certified 23 with anxiety as a primary certification. And it has 24 been picking up at a rate of about 1,000 per week. 25 So right now we're around 3,000 patients, through yesterday, that have been certified with anxiety, 2 which represents about 2.7 percent of the total." The Meeting Minutes Aug. 14, 2019. I am requesting similar aggregate data. (Meeting Minutes Aug. 14, 2019)

4.) And please consider this news release, in which Gov. Tom Wolf's administration states the following: Close to 553,000 patients and caregivers are registered for the program in order to obtain medical marijuana for one of 23 serious medical conditions. There are more than 327,400 active certifications as part of the program. ("Medical Marijuana Program Celebrates.)

5.) And please see the attachment "Email" dated July 27, 2021, in which a department employee provided the top conditions in the program: "As we have shared with you previously, the top three medical conditions being prescribed medical marijuana are chronic pain, anxiety disorders, and post-traumatic stress disorder," the employee wrote.

The above exhibits all underscore points that the Office of Open Records made in its case, AP 2021-1061, (Finnerty vs. DOH). The department is using an overly broad interpretation to deny access to information. At the same time, state employees are selectively releasing some information about the program without providing any legal explanation of why the two situations are different. As the Office of Open Records wrote in Finnerty vs. DOH, "*The overarching question before the OOR is whether the requested information – aggregate data consisting of the number of patients broken down by county – is "information ... relating to patients, caregivers, and other applicants..." 35 P.S. § 10231.302(a). It is difficult to believe that the General Assembly intended the release of aggregate data concerning the medical marijuana program to be a crime, and the context of Section 302 does not support the Department's broad interpretation.*"

On a separate issue in the request, I also sought written policies and procedures. The department denied this request. As the above information suggests, the department does appear to track this information in some format. I'm asking the Office of Open Records to consider my appeal on that issue, as well.

Thank you for your consideration and time.

On Wed, Jul 21, 2021 at 9:07 AM Isenberg, Kelly <kisenberg@pa.gov> wrote:

Mr. Mahon:

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Regards,

Kelly Isenberg



Kelly C. Isenberg | Attorney

Appeals Officer

Office of Open Records

333 Market Street, 16th Floor

Harrisburg, PA 17101-2234

Phone: (717) 346-9903

Fax: (717) 425-5343

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From: Mahon, Ed <emahon@spotlightpa.org>

Sent: Tuesday, July 20, 2021 4:51 PM

To: Isenberg, Kelly <kisenberg@pa.gov>

Cc: DC, OpenRecords <RA-OpenRecords@pa.gov>; PADOHRTK <PADOHRTK@pa.gov>; Keefer, Lisa <likeefer@pa.gov>

Subject: Re: [External] Re: Corrected: Mahon v. DOH: AP 2021-1296

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Cc: PADOHRTK <PADOHRTK@pa.gov>; Keefer, Lisa <likeefer@pa.gov>; Isenberg, Kelly <kisenberg@pa.gov>

Subject: [External] Re: Corrected: Mahon v. DOH: AP 2021-1296

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Thank you.

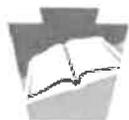
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Sincerely,



Dylan Devenyi
Administrative Officer
Office of Open Records
333 Market Street, 16th Floor

Harrisburg, PA 17101-2234

(717) 346-9903 | **Fax** (717) 425-5343

<https://openrecords.pa.gov>

[@OpenRecordsPA](#)

--

Ed Mahon

Reporter

Cell: 717-421-2518

he/him/his

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--

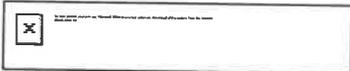
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Mahon, Ed <emahon@spotlightpa.org>

Questions regarding opioid use disorder and medical marijuana

DH, PressOffice <RA-DHPRESSOFFICE@pa.gov>

To: "Mahon, Ed" <emahon@spotlightpa.org>

Cc: "Barton, Maggi" <magbarton@pa.gov>, "Ciccocioppo, Barry" <bciccociopp@pa.gov>

Tue, Jul 27, 2021 at 3:17 PM

Good afternoon Ed,

The Department of Health stands by the decision of the Medical Marijuana Advisory Board. As former Secretary of Health Dr. Rachel Levine shared when this medical condition was approved: "It's important to note that medical marijuana is not a substitute for proven treatments for opioid-use disorder. In Pennsylvania, medical marijuana will be available to patients if all other treatment fails, or if a physician recommends that it be used in conjunction with traditional therapies."

There is an established process through which any individual or organization can submit a request to change, reduce, or add a serious condition to the list of serious medical conditions recognized by the Medical Marijuana Act and regulations.

DOH is charged with implementing the Medical Marijuana Act (Act) and the Act does not establish a limit on the concentration of THC.

Only serious medical conditions may be studied under research programs as defined in chapter 1211 of the Act.

There are currently 8 universities certified to research programs including that we have previously shared:

- Drexel University College of Medicine, Philadelphia;
- Lewis Katz School of Medicine at Temple University, Philadelphia;
- Penn State College of Medicine, Hershey;
- Sidney Kimmel Medical College at Thomas Jefferson University, Philadelphia;
- Perelman School of Medicine at the University of Pennsylvania, Philadelphia;
- University of Pittsburgh School of Medicine, Pittsburgh;
- Lake Erie College of Osteopathic Medicine (LECOM), Erie; and
- Philadelphia College of Osteopathic Medicine, Philadelphia.

While we cannot speak to their research, you can certainly contact the institutions so they can discuss their findings.

Several institutions have this research available on their website. For example, please find research available from Thomas Jefferson University here: <https://ethoscannabis.com/about/research/>

For further information regarding the research process, we would suggest contacting Dr. Brooke Worster, an Associate Professor of Medicine leading the combined research and education efforts of Ethos and Thomas Jefferson University.

During a board meeting, in response to an inquiry made by a board member, the Director of the Office of Medical Marijuana, relayed the percentage of individuals who use Medical Marijuana within those conditions. If a board member raises such a question in a board meeting the director will respond appropriately.

As we have shared with you previously, the top three medical conditions being prescribed medical marijuana are chronic pain, anxiety disorders, and post-traumatic stress disorder.

Thanks,
Maggi

Maggi Barton | Deputy Press Secretary
Department of Health | Office of Communications
Health & Welfare Building, 8th Floor West
625 Forster Street | Harrisburg, PA 17120-0701
Phone: 717.787.1783 | Fax: 717.525.5515
www.health.pa.gov

From: Mahon, Ed <emahon@spotlightpa.org>
Sent: Friday, July 23, 2021 9:09 AM
To: Ciccocioppo, Barry <bciccociop@pa.gov>; Barton, Merylann <mbarton@pa.gov>; DH, PressOffice <RA-DHPRESSOFFICE@pa.gov>
Subject: [External] Questions regarding opioid use disorder and medical marijuana

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7/30/2021

[Quoted text hidden]

Philadelphia Inquirer Mail - Questions regarding opioid use disorder and medical marijuana

Medical Marijuana Program Celebrates Five-Year Anniversary, Continues Commitment to Patients in Pennsylvania

April 17, 2021

Bill Signing, Medical Marijuana, Press Release

Governor Tom Wolf today commemorated the five-year anniversary of Act 16 of 2016, better known as the Pennsylvania Medical Marijuana Act, which established the medical marijuana program in the commonwealth.

Close to 553,000 patients and caregivers are registered for the program in order to obtain medical marijuana for one of 23 serious medical conditions. There are more than 327,400 active certifications as part of the program.

"On the five-year anniversary of the creation of Pennsylvania's medical marijuana program, we continue to forge ahead in getting medicine to those with serious medical conditions," Gov. Wolf said. "The work that the Department of Health does to ensure that products are available and that patients are able to receive medicine as seamlessly as possible, particularly during the pandemic, is exemplary."

All of the 114 operational dispensaries are open and dispensing products to patients. Twenty-eight grower/processors are operational, with 23 shipping product to dispensaries. Many of these grower/processors have recently expanded their location, or are in the process of doing so to help ensure that they are able to provide more products to those with one of the 23 serious medical conditions eligible for use of medical marijuana products.

"In addition to the well-run medical marijuana program, the department is very proud of its unique and first-of-its-kind medical marijuana research program," said Acting Sec. of Health Allison Beam. "It is clear that the Pennsylvania Medical Marijuana Program is among the most successful programs across the country."

The clinical research program, guided by Act 43 of 2018, allows for eight clinical registrants who each must hold both a grower/processor and a dispensary permit. Clinical registrants must have a research contract with one of eight approved academic clinical research centers.

Active cardholders are continuing to visit dispensaries more than once a month to get treatment for a serious medical condition. More than 31.2 million products have been sold since the start of the program, and total sales within the program are close to \$2.6 billion, which includes sales by the grower/processors to the dispensaries, and sales by the dispensaries to patients and caregivers. More than \$1.5 billion in sales has been from the dispensaries to patients.

More than 2,100 physicians have registered for the program, more than 1,530 of whom have been approved as practitioners.

"From before I signed the Act, the state's medical marijuana program's success has been a tribute to the support received from patients and caregivers," Gov. Wolf said. "The dedication from patients and caregivers in offering guidance and support is a testament to the value of this significant program."

As a sign of the program's continued commitment to get medical marijuana to patients, in March of 2020 the program temporarily suspended certain statutory and regulatory provisions in order to improve access to this form of medication during the COVID-19 emergency to:

- Allow dispensary employees to provide medical marijuana to cardholders in their vehicles on the facility's property;

- Remove the current cap that limits the number of patients assigned to one caregiver, to allow for more caregivers to patients in need;
- Eliminate background checks for caregiver applications, limited to renewal applications only, in order to expedite the caregiver renewal process;
- Suspend in-person consultations and allow for remote consultations between approved practitioners and medical marijuana patients; and
- Suspend limitation on medical marijuana dispensing to 30 days by requiring approved practitioners to notate on the patient's certification to dispense a 90-day supply.
- Suspend requirement for a medical professional – physician, pharmacist, physician assistant or certified registered nurse practitioner – to be on site at the dispensary during dispensing hours, which allows for medical professionals to work remotely.

The statutory and regulatory suspensions will remain in place for as long as the Proclamation of Disaster Emergency is in effect.

For more information about the medical marijuana program, visit www.medicalmarijuana.pa.gov or follow the Department of Health on Facebook and Twitter.

MEDICAL MARIJUANA

ADVISORY BOARD MEETING

* * * * *

BEFORE: RACHEL LEVINE, M.D., Chair
Shalawn James, Member
Molly Robertson, Member
Raymond J. Tonkin, Esquire, Member
Sarah Boateng, Member
Lt. Col. Robert Evanchick, Member
Janet Getzy Hart, R.Ph., Member
Luke Shultz, Member

HEARING: Wednesday, August 14, 2019
10:06 a.m.

LOCATION: Keystone Building Meeting Center
Forest Room
Suite 114 East
400 North Street
Harrisburg, PA 17120

Also Present: Holli Senior, John J. Collins, Kevin Hoffman, Esquire

Reporter: Hannah Rinaldo
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NONE OFFERED

P R O C E E D I N G S

1
2 -----
3 CHAIR: I'd like to call the meeting
4 to order. This is the Medical Marijuana Advisory
5 Board Meeting starting at a little after 10:00 a.m.
6 on Wednesday, August 14th, 2019, and I am Dr. Rachel
7 Levine, Secretary of Health.

8 Before I do the roll call, I would
9 like to introduce the Board's newest member, the new
10 president of the Pennsylvania District Attorney's
11 Association, Pike County District Attorney Mr. Ray
12 Tonkin. Thank you very much for joining us.

13 ATTORNEY TONKIN: Thank you.

14 CHAIR: We look forward to working
15 with you.

16 ATTORNEY TONKIN: Same here.

17 CHAIR: So is there anyone on the
18 phone? Is the phone line open?

19 MS. SENIOR: Yes.

20 CHAIR: Okay.

21 So there you go. So let's do the roll
22 call. I know that Dr. William Goldfarb, Ms.
23 Jennifer Shuckrow and Mr. Kalonji Johnson will not
24 be joining us today. And we have some other -
25 couple other people absent.

1 So Secretary of Health, Rachel Levine,
2 I am here.
3 Commissioner of State Police
4 Evanchick?
5 MR. EVANCHICK: Here.
6 CHAIR: Ms. - Dr. Janet Getzy Hart?
7 DR. GETZY HART: Present.
8 CHAIR: Great.
9 I know Kalonji Johnson is not here.
10 Sarah Boateng?
11 MS. BOATENG: I am here.
12 CHAIR: Mr. Scott Bohn on the phone?
13 That rhymed. Nope.
14 Mr. Ray Tonkin?
15 ATTORNEY TONKIN: Present.
16 CHAIR: Dr. Bill Trescher, not here.
17 Molly Robertson?
18 MS. ROBERTSON: Here.
19 CHAIR: Jennifer Shuckrow will not be
20 here. Dr. Lanie Francis on the phone? Dr. William
21 Goldfarb is out of the country.
22 Shalawn James?
23 MS. JAMES: Here.
24 CHAIR: And Mr. Luke Shultz?
25 MR. SHULTZ: Here.

1 posted a medical marijuana research summit on July
2 11th under the Chapter 20 program.

3 We had representatives from eight of
4 what are called the Academic Clinical Research
5 Center, or ACRC. That included the Drexel
6 University College of Medicine, the Katz Temple
7 University School of Medicine, the Penn State
8 College of Medicine, the Kimmel Thomas Jefferson
9 University Medical College, the Perelman University
10 of Pennsylvania School of Medicine, the University
11 of Pittsburgh School of Medicine, and then the Lake
12 Erie College of Osteopathic Medicine and the
13 Philadelphia College of Osteopathic Medicine. So
14 eight ACRCs. And they came and presented on the
15 research that they are going to consider to explore
16 under the Chapter 20 program.

17 Now, we have had two rounds for
18 approval of clinical registrants that will work with
19 these ACRCs. The clinical registrant will search as
20 the grower/processor and run the dispensaries for
21 these research programs, so they'll be very close
22 partners.

23 In the first round, none were deemed
24 sufficient to be approved.

25 In the second round, three won

1 approval. And they include Agronomed Biologics, MLH
2 Explorations and PA Options for Wellness. And so
3 they would have had representatives that were
4 present there as well. It was held in this room.

5 And so I thought that the summit was
6 excellent. We heard from all of the different ACRCs
7 about the types of research that they would be
8 looking at. This includes pre-clinical research,
9 pharmacological research, baby animal research that
10 they would be looking at because a lot needs to be
11 known about the different compounds present in
12 medical marijuana. And it also, of course, included
13 clinical research.

14 The three that have - that I have
15 clinical registrants that they'll be working with -
16 which includes Penn State College of Medicine with
17 the PA Options for Wellness. And I'm going to
18 forget the other two, John. Who works with
19 Agronomed?

20 MR. COLLINS: Oh, with Agronomed is
21 Drexel.

22 CHAIR: Drexel? And MLH?

23 MR. COLLINS: MLH would be Temple.

24 CHAIR: Temple? Great.

25 MR. COLLINS: I'm sorry, Jefferson.

1 CHAIR: Jefferson? Okay.

2 Thank you.

3 So Agronomed with Drexel, MLH
4 Explorations with -

5 MR. COLLINS: Jefferson.

6 CHAIR: - Jefferson, and PA Options
7 for Wellness with Penn State.

8 MR. COLLINS: Correct.

9 CHAIR: So we talked a lot about the
10 clinic research conditions that they would be
11 looking at, researching. A lot of the conditions
12 included chronic pain, the conditions included
13 opioids, but then other conditions that would be
14 looked at.

15 All the ACRCs have plans to be in a
16 fleshing out plan to conduct that research, so I
17 thought it was a very useful summit where we decided
18 that every six months, I believe, -

19 MR. COLLINS: Uh-huh (yes).

20 CHAIR: - we would have a research
21 summit to - where we would bring them all together.
22 And what we're hoping for is actually some
23 collaboration in terms of the research.

24 For instance, if you were doing
25 research on two different types of medical

1 marijuana, one with a high CBD, low THC, and the
2 other the opposite, on a condition, one could do one
3 and one could do the other, and then you could see
4 how - you could compare and contrast.

5 So hopefully they will be able to - to
6 collaborate. And there was a robust spirit of
7 collaboration in the room, so I thought that that
8 went really well.

9 Now, we will be having a round three
10 that will be sometime - opened up sometime this
11 fall.

12 MR. COLLINS: Yes.

13 CHAIR: It's for round three for
14 clinical registrants. The goal is that each ACRC
15 will successfully be able to collaborate with a
16 clinical registrant so they can do the research.

17 Any questions before I move forward?
18 You have a question?

19 MS. ROBERTSON: I have a question.
20 Maybe you answered it.

21 CHAIR: Yes?

22 MS. ROBERTSON: I know that there are
23 some issues just with the federal licensing and
24 everything. Are any of these studies actual
25 double-blind studies or is it all data collection?

1 CHAIR: Well, so it will be primarily
2 - in terms of clinical studies, you could, in
3 theory, do a double-blind procedural control.

4 I think that at the start it will
5 probably be more clinical observational studies, but
6 we'll see.

7 None of it is - I mean, it is not
8 necessary for these ACRCs to have a Category 1 DEA
9 license so - like Dr. Sisley has. They're going to
10 be doing their research under the Chapter 20 program
11 in Pennsylvania.

12 MS. ROBERTSON: So they don't need to
13 worry about federal funding to do -?

14 CHAIR: That's correct. None of them
15 - well, none of them, I mean, the - to get any
16 federal funding, you would have to be like Dr.
17 Sisley and have a DEA 1 license and then you'd have
18 to use medical marijuana from the University of
19 Mississippi. So this is not what we're talking
20 about.

21 And so the money - I mean, this
22 program would be synergistic so the clinical
23 registrants would have a grower/processor to be able
24 to grow and process the medicines. Of course, it
25 has to be approved by the laboratory, et cetera.

1 And then the clinical registrants will be operating
2 up to how many dispensaries?

3 MR. SHULTZ: Six.

4 CHAIR: Six dispensaries. And
5 there'll be income generated from those dispensaries
6 and that's what's going to be funding the research.
7 So it's kind of self-funding.

8 MS. ROBERTSON: Yes. So in
9 Pennsylvania they can do clinical studies without
10 having federal licensing?

11 CHAIR: That is correct.

12 MS. ROBERTSON: And I mean, many of
13 these places have federal funding for other things.
14 Is that jeopardized by them doing
15 this?

16 CHAIR: There is no evidence they
17 would be jeopardized.

18 MS. ROBERTSON: Or a legal -?

19 CHAIR: Well, I'm sure, I mean, they
20 all have armies of attorneys that would be working
21 with them. And so that is why - and the law was
22 quite astute in terms of how it was written - is
23 that the - none of the academic centers will be
24 distributing medical marijuana on its campus. They
25 are collaborating with the clinic registrant who

1 handles the grower/processing and the dispensing.

2 The clinical - the ACRCs will have
3 physicians who are collaborating on the research
4 with researchers from the clinical registrants. And
5 they will have - for instance, they will be
6 certified practitioners under the program to refer a
7 patient, and all of them will be organized ahead of
8 time.

9 But there will not be any dispensaries
10 on - in their dispensary or on their campus.

11 MR. SHULTZ: Yeah. That's correct.
12 It would take a rescheduling of marijuana for that
13 to occur.

14 CHAIR: Right. But that's how the Act
15 is getting around -.

16 MS. ROBERTSON: Got it. Thank you.

17 CHAIR: So I think that it has a lot
18 of potential. These clinical registrants need to go
19 through a whole process that all the
20 grower/processors and dispensaries have done. So
21 there's a process for that, and it takes a while.
22 And they'll have to be inspected and approved by our
23 program. And so all that takes time.

24 But then we have another round and we
25 are cautiously optimistic that these clinical

1 registrants will get approved - will be able to get
2 approved and start working with their ACRCs for the
3 five other programs.

4 Other questions? Yes?

5 MR. SHULTZ: Since the clinical
6 registrants are - on funding the studies, are they
7 considered nonprofit or are they still profit
8 entities, for profit?

9 CHAIR: I'm looking to our attorneys
10 and John.

11 MR. COLLINS: I'll make a comment,
12 then I'll look to the legal staff to add to that if
13 they like. But there's no requirement in the
14 statute that they be nonprofit.

15 CHAIR: That's probably the best we
16 can do. But the clinical registrants are committed,
17 as the ACRCs, to doing high quality medical
18 research. But that's why I called the - so I have
19 the privilege of being an academic medicine
20 physician. I have come from Penn State College of
21 Medicine, have done clinical research, and lab
22 research a million years ago, but mostly clinical
23 research.

24 And so you know, we're going to work
25 together and we're going to be continuing to

1 strongly promote, you know, pre-clinical research,
2 but particularly clinical research on medical
3 marijuana for this program.

4 MR. SHULTZ: Okay.

5 CHAIR: I think that as the program
6 matures, and you know, the ACRCs are up and running,
7 the grower/processing dispensary studies are being
8 outlined, all of the ACRCs have clinical
9 registrants, we will have, you know, probably the
10 strongest medical marijuana research program in the
11 country, but it's going to take a while to mature.

12 One thing that's important to note is
13 that all of the clinical research will have to be
14 approved by the Institutional Review Boards, or
15 IRBs, of those institutions.

16 So taking Penn State nearby is that
17 they have an IRB. So if I was doing research in my
18 previous life on adolescent medicine, if I wanted to
19 do a research study on a specific program for
20 anorexia nervosa, that had to be approved by the IRB
21 because you're doing human research.

22 And the same with this. All has to be
23 approved by the IRBs. And then, of course, your
24 pre-clinical research with animals is in a different
25 -.

1 MR. SHULTZ: Sounds great.

2 CHAIR: Great. Looking forward to it.

3 So aside from the summit, this past
4 February, the Medical Marijuana Advisory Board,
5 yourselves, recommended that I approve anxiety
6 disorders and Tourette's syndrome as approved
7 serious medical conditions in the program.

8 And so after a very careful review of
9 the medical literature, I did approve these
10 recommendations. And in a press conference prior to
11 the summit, I announced that effective on July 20th,
12 anxiety disorders and Tourette's syndrome would
13 become approved serious medical conditions in the
14 medical marijuana program.

15 And in your packets - no. So well, if
16 you want a list of some of the articles, it's not an
17 exhaustive list, but some of the key articles we can
18 send it to you, so let us know.

19 So you know, I took this decision
20 really very seriously, as I make all decisions. But
21 I really carefully reviewed the literature. And I
22 did provide some recommendations for physicians,
23 dispensing pharmacists and patients in terms of
24 medical marijuana for these conditions.

25 As always, patients should consult

1 with their healthcare provider. And if their
2 general health care provider is separate from their
3 certifying physician, just consult with all of them
4 to see if medical marijuana would be beneficial for
5 them on an individualized basis for their
6 conditions.

7 For both conditions, anxiety disorders
8 and Tourette's syndrome, medical marijuana is not
9 the first line of treatment. There are other -
10 other standard of care treatments, and it should not
11 replace traditional therapies, but should be used
12 potentially in conjunction with them or to replace
13 them, for instance, if they were not working as
14 recommended by a physician.

15 One of the very important points, and
16 I have seen in my practice many patients with
17 anxiety disorders, the patients with anxiety
18 disorders should continue counseling and therapy to
19 manage their illness. Medical marijuana would be
20 medicine to assist in their treatment, but
21 counseling and therapy is absolutely critical, and
22 medical marijuana should not replace that, as other
23 medicines shouldn't replace that in terms of other
24 medications used for anxiety disorders.

25 The research indicates, at least at

1 this time, that medical marijuana with a low THC
2 level and a higher CBD level are more effective for
3 treatment of anxiety disorders and is recommended
4 for shorter term use.

5 And additionally, medical marijuana is
6 not recommended to treat children and adolescents
7 with anxiety disorders, that their brains are still
8 developing. As a pediatrician, I do not recommend
9 the use of medical marijuana to treat anxiety in
10 patients under 18 years of age.

11 Pregnant women with any of the
12 approved conditions really should not use medical
13 marijuana because the impacts on the fetus are not
14 known.

15 And I also wanted to take the
16 opportunity to - today to stress a couple other
17 points in terms of the medical evaluations for these
18 patients. It is very important that doctors who are
19 certified practitioners fulfill their commitments to
20 provide an appropriate patient consultation as
21 required by the statute.

22 A patient consultation is defined by a
23 complete, in-person examination of a patient and the
24 patient's health records at the time that a patient
25 certification is going to be issued by a

1 practitioner.

2 Additionally, they must complete the
3 following. Conduct a patient consultation in a
4 manner appropriate to make a medical determination
5 as to the patient's serious medical condition, one
6 of the 23 now serious medical conditions. Make a
7 diagnosis of the serious medical condition for a
8 patient to receive - that they will receive medical
9 benefits, or in the case of palliative care,
10 palliative care benefits for the use of medical
11 marijuana.

12 They need to establish a medical
13 record for the patient and maintain that medical
14 record. They need to consult the Prescription Drug
15 Monitoring Program database to review if the patient
16 has been recently dispensed any controlled
17 substances that might interact with medical
18 marijuana. They have received informed consent from
19 the patients or from the patient's caregiver,
20 applicable custodial legal guardian, et cetera.

21 So to add a - sort of outside of the
22 Act, a few personal points, you know, until five
23 years ago, I was a practicing physician in
24 pediatrics and adolescent medicine in - at Penn
25 State Hershey Medical Center. And so I saw patients

1 with some, not must of, but some of these approved
2 conditions.

3 And so I know, and there aren't
4 physicians here today, but physicians know what a
5 patient consultation means. We learn in medical
6 school that that means a history and a physical
7 examination. That means a review of pertinent
8 records, and then a discussion with the patient, a
9 determination of what would be the best treatment,
10 and then discussion of the risks and benefits of
11 different treatment, and then whatever appropriate
12 follow-up would be necessary when prescribing a
13 medication or making a referral for medical
14 marijuana.

15 That's what I expect from our
16 physicians, and so I wanted to emphasize that point
17 and take the opportunity today to emphasize that.

18 We now have 23 physicians to conduct
19 scientific medically-based research that - I believe
20 that will help Pennsylvanians, but really the - one
21 of the premier programs for medical research on
22 medical marijuana in the country.

23 I'm pleased to answer any questions
24 about my comments. Yes?

25 MR. SHULTZ: Did any of the ACRCs

1 indicate that they were interested in studying
2 anxiety?

3 CHAIR: Well, so I announced -
4 informally, but I announced that the day of the
5 meeting. So anxiety was not an approved condition
6 when they arrived in the morning.

7 MR. SHULTZ: Okay.

8 CHAIR: So they would not have known
9 that I was going to approve anxiety and Tourette's,
10 so it's unfair to ask them of that at this time.

11 But I would say that, yes, I would
12 expect that anxiety will be one of the 23 conditions
13 that some of the centers will be researching. But
14 it was pre-mature to ask them.

15 MR. SHULTZ: Okay.

16 CHAIR: Yeah.

17 Other questions from the Board?

18 Very good.

19 So now I believe, John, you'll be
20 doing an update on the program?

21 MR. COLLINS: I will. Thank you.

22 CHAIR: Has anyone joined us on the
23 phone?

24 MS. SENIOR: Dr. Francis had an
25 emergency patient.

1 CHAIR: Okay.

2 MS. SENIOR: I didn't hear back from
3 the -.

4 CHAIR: Sounds good.

5 MR. COLLINS: Good morning, everyone.
6 Carrying forward, Secretary Levine,
7 with your comments about expectations for
8 practitioners, the Act and the regulations have
9 requirements for both practitioners which are
10 embedded in our registry system and our
11 certification system. It also extends to medical
12 professionals at the dispensary which include
13 physicians, but in most part include Board-Certified
14 pharmacists.

15 So in keeping with that theme about
16 how does the certification begin and what are the
17 expectations of the medical professional in front of
18 the patient, going forward into the dispensary we
19 have sent out a reminder recently about those
20 regulatory requirements which include that a medical
21 professional at the dispensary review the patient
22 certification each and every time prior to any
23 dispensing activity, and that's a requirement.

24 Other than it being a regulatory
25 stated requirement, there are requirements made by

1 the patients' physicians, as well as prohibitions in
2 that certification. So we want to be sure that the
3 dispensary is providing exactly what the patient's
4 approved practitioner is recommending.

5 Also, under the regulations, the
6 approving practitioner, after the first purchase,
7 may make a change to the patient's certification.
8 So again, it creates a need for the medical
9 professional at the dispensary to consult that
10 certification to be absolutely certain that they are
11 providing what is recommended by the approved
12 practitioner.

13 Going forward, on patients and
14 caregivers, I'll give the group an update on where
15 and how the program is evolving here. And it's
16 moving along very quickly.

17 So in terms of numbers, for the
18 benefit of the group, just to preface this with,
19 I'll give group updates on how many certified
20 patients we have, how many certified caregivers we
21 have, but I'll also speak to the revenue. We
22 haven't provided a revenue update in quite some
23 time. So these numbers are compelling, and I'll get
24 to that in just a moment.

25 We have over 200,000 registrants that

1 have been supported by our system. About 180,000 of
2 those are patients and about 20,000 or so of those
3 are caregivers. That rolls down to how many
4 patients have seen a practitioner, resulted in a
5 purchase of a card, and are visiting our
6 dispensaries on an ongoing basis. That's the next
7 number I'm giving you.

8 So roughly 121,000 active
9 certifications exist, meaning patients are actively
10 purchasing product. That has resulted, since our
11 first dispensing activity February 15th, 2018, in
12 1.6 million visits by patients to dispensaries in
13 the Commonwealth, and over 4.4 million products
14 dispensed. So our seed-to-sale system is working,
15 the process is working, the dispensaries are working
16 hard and we have a robust system.

17 In terms of what does that mean in
18 revenue, I'm going to first give you a total revenue
19 number, which is the total value of this market, and
20 then break it down into sales by grower/processors
21 to dispensaries, and sales by dispensaries to
22 patients and caregivers.

23 So the total number is approximately
24 \$350 million in total sales. That's as of our first
25 dispensing activity more than a year ago.

1 Of the \$350 million, \$150 million of
2 those roughly are sales by grower/processors to
3 dispensaries. And about 190 or almost \$200 million
4 are sales by dispensaries to patients.

5 More recently, sales by
6 grower/processors to dispensaries have been growing
7 quicker than sales by dispensaries to patients.
8 That phenomenon will not exist in the future, but is
9 a result of many new dispensaries becoming
10 operational and needing to - needed to do an initial
11 inventory stock. Some of them hold 60 or 30 days'
12 worth of inventory.

13 So total sales by dispensaries have
14 been growing at a rate of about three percent a
15 week. Total sales by grower/processors to
16 dispensaries have been growing in excess of that at
17 about five percent, which will double up.

18 In terms of where we stand with
19 growers and processors, the operation - I'm pleased
20 to report as of close of business yesterday, the
21 Department deemed our 60th, that's 6-0, 60th
22 dispensary operation. And that information is
23 currently on our website.

24 Also, in terms of grower/processors,
25 of the 25 that were issued permits over both phase

1 one and phase two, 18 of the 25 have been deemed
2 operational, and ten of those are currently shipping
3 product. One is completing their final phase of
4 processing, and the other one has been issued a
5 revocation of their permit.

6 In terms of next steps for Chapter 20,
7 the Secretary mentioned that this is going to occur,
8 or is likely at the early part of the fall. This
9 would be phase three.

10 My guidance to anyone here and to the
11 Board is a notice will be published in the PA
12 Bulletin. If you're unfamiliar with that, that
13 occurs electronically on Friday. It becomes
14 published every Saturday. So my guidance is to look
15 to the PA Bulletin probably starting very soon for a
16 notice that would indicate exactly when permits
17 would be available and exactly when they're due.

18 And one comment, Secretary Levine, on
19 the research summit, is as a result of that summit
20 and collaboration, the energy level has picked up
21 after that meeting and we continue to talk with, and
22 work with, those ACRCs, as well as the clinical
23 registrants that were referred.

24 That brings me to a natural stopping
25 point. Any questions? Yes, sir?

1 MR. SHULTZ: I'm not sure if you can
2 answer this. I don't know if you track this kind of
3 information, but with the addition of anxiety to the
4 list of qualifying medical conditions, did you
5 happen to see a bump or an increase in the number of
6 patients registering?

7 MR. COLLINS: Yeah. Let me - thanks.
8 Thank you for that. One of the things I failed to
9 mention, and I'll get to that specific, is the mix,
10 - without regard to anxiety because that's new - but
11 the mix of serious medical conditions approved is
12 relatively unchanged. It's about 50.5 percent for
13 pain, specifically for intractable pain.

14 As it relates to anxiety, yes, there's
15 been a pick up. The certification process got
16 turned on about four days ahead of time. Kudos to
17 the Department, the legal team, as well as to our
18 vendor, for working diligently to get that up ahead
19 of time.

20 As a result of that, during the first
21 certification period, which was just the first four
22 days after approval, 212 patients were certified
23 with anxiety as a primary certification. And it has
24 been picking up at a rate of about 1,000 per week.
25 So right now we're around 3,000 patients, through

1 yesterday, that have been certified with anxiety,
2 which represents about 2.7 percent of the total.

3 So if you were to ask, for example,
4 how does that compare with the rest of the disease
5 states, that growth rate, it makes it fairly
6 compatible with how pain rolled out initially.

7 MR. SHULTZ: Another question. There
8 seems to be a shortage of product in a number of the
9 dispensaries, especially flowers. Is that a result
10 of the new dispensaries coming online and their
11 initial inventory requests?

12 MR. COLLINS: It could be. We're not
13 aware of specific shortages elsewhere. What we are
14 aware with - or are aware of is that - from patient
15 feedback is that the mix of products, whether in
16 that case it's dry leaf at a specific dispensary or
17 it's high CBD, low THC ratios, aren't as readily
18 available as they feel they could be.

19 So Secretary, beginning this
20 afternoon, we're meeting with a team of patients who
21 guided us with the original regulatory development
22 to begin seeking that feedback so that we can have a
23 formalized way of getting that back to the
24 grower/processors. But I'm not aware of any
25 shortage of dry leaf.

1 MR. SHULTZ: That's all I have.

2 CHAIR: Are there any other questions?

3 Very good.

4 MR. COLLINS: Thank you.

5 CHAIR: So thank you, John. So

6 actually that brings us to the end of our

7 presentation for this Board meeting.

8 There were no new conditions that came
9 to the Board - well, to the medical subcommittee to
10 be brought to the Board for this meeting. So there
11 are no new conditions to review at this time.

12 So I'll open up to any discussions
13 that the Board would like to talk about. Yes?

14 MS. ROBERTSON: I would like to talk
15 about Illinois and their Alternative to Opioids Act
16 I sent you guys some information on that, and I'm
17 wondering if this is something that we could do
18 here.

19 CHAIR: So could you please refresh my
20 memory in terms of some of the specifics that you're
21 referring to?

22 MS. ROBERTSON: Well, to dumb it down
23 a little bit or a lot, basically people that are
24 prescribed opioids can take that to a dispensary and
25 get it traded for medical marijuana on a temporary

1 basis. And I'm thinking that probably would require
2 a whole new law somewhere.

3 CHAIR: Definitely.

4 MS. ROBERTSON: But I still would like
5 to hear your comments.

6 CHAIR: Well, so that would require
7 legislation, so there's no way that that could -
8 that could work under our present system in terms of
9 how the legislation works and the way our system is
10 developed. I guess, from a medical point of view,
11 or as a physician, I would have concerns.

12 Medical marijuana, I mean, - so if you
13 have acute pain from a root canal or from a wisdom
14 teeth removal, there is not strong evidence that I
15 have seen - although I'd be willing to review the
16 literature on it - for medical marijuana for acute
17 dental pain. You know, I mean, in the literature
18 and primarily and what our Act says is that it's for
19 chronic.

20 MS. ROBERTSON: Yes.

21 CHAIR: So if you sprain your ankle,
22 the use of medical marijuana for acute pain for a
23 sprained ankle would be, I think, limited.

24 MS. ROBERTSON: So to interrupt -
25 sorry.

1 CHAIR: Yeah.

2 MS. ROBERTSON: Like, I know people
3 that have had major surgery -

4 CHAIR: Right.

5 MS. ROBERTSON: - and post-op in the
6 hospital did not take any of the pain medication.
7 They strictly used RSO, Rick Simpson Oil, and have
8 never used, you know, I mean, -

9 CHAIR: Right.

10 MS. ROBERTSON: - and it's an amazing
11 thing to me. And, you know, just with the opioid
12 crisis -.

13 CHAIR: Right. I guess - so I
14 probably chose the not great examples. So we
15 actually don't recommend opioids for root canals -

16 MS. ROBERTSON: Any more.

17 CHAIR: - or dental procedures or for
18 a sprained ankle. But I think acute post-op pain
19 would be a good one. I have seen - that's
20 anecdotal.

21 MS. ROBERTSON: Yes.

22 CHAIR: I have not seen any literature
23 on that, meaning I have not seen anything - so if
24 someone came to me and, gee, could we use medical
25 marijuana for acute post-op pain, I would review the

1 literature.

2 I have not reviewed or seen any
3 literature about medical marijuana in the medical
4 literature for acute post-op pain. And so I would
5 be worried, both from an under treatment point of
6 view, and potentially about someone who had an
7 operation, takes that prescription for, you know,
8 three days of Vicodin and goes to get medical
9 marijuana instead. I mean, I have not seen, other
10 than the anecdotes that you provided, evidence that
11 that would be true.

12 MS. ROBERTSON: And I mean, to be
13 brutally honest, I haven't really read any research
14 in that area, but -.

15 CHAIR: So I would have some medical
16 concerns about that, although it's not something
17 that I've researched before. So I think that - I
18 mean, we certainly want to continue to make progress
19 in terms of the opioid crisis. We have very strong,
20 what I call, opioid stewardship efforts. They
21 include prescribing guidelines for 12 conditions.
22 We're having new conditions in the pipeline under
23 the prescribing task force, as well as revising the
24 other conditions.

25 We have medical student education

1 about pain and opioids. We have CMEs that are
2 required for opioids, for people that are going to
3 be licensed, and nurse practitioner licenses, et
4 cetera. And then we have the Prescription Drug
5 Monitoring Program. And so - and academic detail.
6 We have lists of opioid stewardship efforts.

7 With all of those efforts, we have
8 decreased opioid prescriptions approximately 27
9 percent in three years. And if you look even - if
10 you farther than that, it's probably more than that.
11 It's well over 40 percent.

12 So I think that we're making progress
13 in that regard. I would be interested - actually,
14 if Illinois had done this, I mean, hopefully they'll
15 study it and we'll see how it works.

16 So I would want to see that evidence
17 from Illinois before I would specifically recommend
18 it.

19 MS. ROBERTSON: Okay.

20 Next subject.

21 CHAIR: Sure.

22 MS. ROBERTSON: I know that Luke was
23 working on trying to get Patrick Nightingale in
24 here -

25 CHAIR: Yes.

1 MS. ROBERTSON: - to speak with the
2 Board. Can you - where are we at with that?

3 CHAIR: So I spoke with him, and it
4 was not possible for this visit, but we will glad to
5 welcome him at the next one. We might have some
6 other speakers at the next Board meeting, so we'll
7 be discussing in about five minutes external
8 speakers, including him. So we will actually - we
9 were discussing this yesterday. It was not possible
10 for this Board meeting, but we will invite him to
11 the next Board meeting. And any external speaker -
12 we're planning to hear approximately five.

13 MS. ROBERTSON: Thank you.

14 MR. SHULTZ: Yeah. I was hoping
15 Patrick could be here today, but I'm glad to hear
16 that he was invited for the next time because he
17 brings a unique perspective in that he's not only a
18 patient but he's a former prosecuting attorney.
19 He's currently a defense attorney.

20 CHAIR: Right.

21 MR. SHULTZ: And I know he wanted to
22 address some issues with law enforcement, as well as
23 just educating the Board in general on what products
24 are available, and types of administration and
25 administration devices. Because I have a feeling

1 that some of the Board members aren't real familiar
2 with some of that stuff, not being patients, not
3 being caregivers. I would imagine some of the Board
4 members haven't even been into a dispensary since
5 they're not necessarily cardholders, as well as we
6 have not been given the opportunity to see the
7 behind the scenes operation of grower/processor
8 facilities.

9 CHAIR: So that would not - my
10 impression is that's not possible under the Act.
11 And that we would not be able to visit a dispensary
12 unless we're - including the Secretary of Health, so
13 unless someone is a cardholder or caretaker. And I
14 don't think that any of us are allowed to visit
15 dispensaries unless it was part of a regular
16 inspection that John's team was doing. So that's
17 not possible. .

18 MR. SHULTZ: Can that possibly be
19 rectified through a change in the regulations?
20 Because as it is now, even local law enforcement and
21 first responders like firemen cannot take a tour of
22 a facility to see how the facility is laid out, find
23 out if there's any specific hazards in the case that
24 they'd have to respond there. And it seems a little
25 haphazard to not allow for that.

1 MR. COLLINS: Point taken. But we
2 work with the dispensary and the guidance we provide
3 is to engage the community, which includes those
4 services you mentioned, before they receive product.

5 So there's a considerable amount of
6 time before they're deemed operational, and even
7 after being deemed operational, they can certainly
8 invite those services in to be able to see the
9 dispensary.

10 MR. SHULTZ: The grower/processors
11 also?

12 MR. COLLINS: No. So we can work with
13 - and we have no requests for that presently. But
14 should we get one, then we'll have to work through
15 that.

16 CHAIR: Now, for our legal team, is
17 that regulation or is that legislation?

18 ATTORNEY HOFFMAN: It's legislation.

19 CHAIR: So it would require a change
20 in legislation. Again, one of our - I think one of
21 the strengths of our program, you know, as we
22 collaborate with law enforcement, you know, as part
23 of our Board and with everyone, is our commitment to
24 our seed-to-sale tracking and to prevent any
25 diversion. I think that our - we have to be

1 extremely stringent about that. This is a medical
2 program. It's for patients with serious conditions.
3 I think we have a great system in terms of
4 grower/processors, dispensaries, certifying
5 physicians, patients or caregivers going to the
6 dispensary. It's all tight in terms of the product
7 and the packaging, although we might hear from
8 someone about, you know, their thoughts about the
9 packaging, and we can always make improvements.

10 But we want to be absolutely sure that
11 we have a tight system so that it enhances our
12 credibility with the general public, with the
13 legislature and with congress. I think it's
14 critical to our program. Any other questions? Sir?

15 ATTORNEY TONKIN: I just wanted to
16 follow-up on District Attorney Adams' comments at
17 the last meeting -

18 CHAIR: Sure.

19 ATTORNEY TONKIN: - that was held.
20 Has there been any progress in education for law
21 enforcement about either what medical marijuana
22 cards looks like or the products that they may see
23 on the street? There was a decision out of Lehigh
24 County recently, a Lehigh County Judge, so I just
25 wanted to know if you had any progress.

1 CHAIR: We would definitely like to do
2 that. John?

3 MR. COLLINS: Yeah, sure. Just to
4 give you a bit of an update, the history here is
5 training law enforcement directly is through a third
6 party. What we learned - and that would be through
7 Team DUI. So training the trainers and providing
8 them with the necessary information, it's a
9 procurement base approach. So Team DUI is the
10 training provider that trains the drug rec condition
11 experts, DREs. And it's my understanding that there
12 are about a hundred of them across the Commonwealth.

13 Beyond that, it became apparent to us
14 after getting the feedback that at the point of
15 contact, which means local law enforcement in front
16 of the patient, that they could use some additional
17 information. So we have provided packaging and
18 training. I provided it to Mr. Adams that same day
19 for additional distribution. I don't know whether
20 that was sent anywhere.

21 We also had the local investigator for
22 the county in which he presides to come in and to
23 give us a little bit more background and provide
24 some guidance on where additional training points
25 might be beneficial.

1 So either we're able to do those
2 directly or access them through other agencies, for
3 example, trying to get at the academy for new hires,
4 trying to get to the police chiefs' association.
5 Trying to encourage dispensaries - and I'll call one
6 out as a best practice - they've done a very good
7 job here - that was noted in that article.

8 To continue to encourage dispensaries
9 as part of their community impact programs, to
10 engage law enforcement and train them, because
11 they're the entity that is dispensing in the
12 community. And they can say in this community this
13 is what the product looks like.

14 And the best practice I can give you
15 at the moment is Keystone Canna Remedies in
16 Allentown, noted as KCR. They were our first
17 operational dispensary. So although I'm going to
18 give them kudos, they've been out there for a long
19 time. And they, as part of their engagement in the
20 community, actively train law enforcement. Not to
21 leave anyone else out, I'm also aware that RISE in
22 Steelton and RISE in Carlisle do the exact same
23 thing. That's generated and facilitated through
24 their medical professional staff, pharmacists who
25 are providing the training.

1 And so what we're doing is - and our
2 focus has been on protecting the patients. And the
3 guidance we've given patients, in addition to
4 additional training where we can for law
5 enforcement, has been to have these three things in
6 their possession at all times; their card, the
7 original container the product was dispensed in,
8 because that contains the label with their name on
9 it, where it was dispensed, and also their cash
10 receipt. I mean, we'll take the first two, but
11 actually you have to have the first and second one.

12 So in an instance where someone is
13 transporting product not in its original container,
14 and without their ID card and absent a receipt, that
15 is the highest risk position for any of our patients
16 to be in.

17 CHAIR: So we would be pleased to work
18 with you in your new position as president of the
19 association, as well as with Lieutenant Colonel
20 Evanchick and law enforcement.

21 As you know, there are a lot of police
22 departments, municipal police departments in the
23 state. We're not going to be able to train
24 everyone, but we would be pleased to come to, you
25 know, the District Attorney's Association meetings.

1 We'd be pleased to come to a police chief meeting
2 and talk. But I think that a lot of it is going to
3 be that the dispensary, that local connection, we'd
4 be pleased to facilitate that, and supplier. But I
5 think it's a very important point and we're pleased
6 to work with you on that.

7 MR. EVANCHICK: There are some
8 training programs out there now that a number of
9 state police have been participating in. I'm not
10 sure what the actual entity is. I thought it was
11 through the DA's Association but I'm not sure.

12 We have invited John up to talk to our
13 commanders about this marijuana program in the past.
14 And we do train our cadets as well on the aspects of
15 medical marijuana.

16 To echo your sentiments, though, they
17 need to have all those things present when they're
18 out there in the vehicle, because in some cases it's
19 lacking, and that's where the problem is going to
20 be. That case that you referred to, I believe, the
21 case is being appealed as well. So I don't know how
22 that will go.

23 ATTORNEY TONKIN: Yes. The county DA
24 did indicate that he was going to appeal the
25 decision. And in the interest of patient

1 protection, that's exactly, you know, what I was
2 interested in in terms of law enforcement,
3 understanding it and being able to make a decision
4 there on the street based on the information that
5 they have. And that education, I think, will really
6 help with patient protection.

7 MR. EVANCHICK: Right.

8 ATTORNEY TONKIN: And not bring any
9 unnecessary cases into the criminal justice system
10 that will be able to be understood by law
11 enforcement with full information to make a
12 decision.

13 MR. COLLINS: And as Secretary Levine
14 pointed out, I'm happy to go anywhere to train
15 anyone. And my experience in making those
16 engagements is that there's a lot of confidence
17 generated when it's learned by law enforcement that
18 the Department is using the same vendor to create ID
19 cards that are used for driver licenses. So the
20 background is the same, the watermarks are the same.

21 And then the discussion then quickly
22 goes to tell me about the product, what does it look
23 like, how does the container read and how can I
24 validate that the person in front of me holding this
25 product is supposed to have the product in their

1 possession. Definitely happy to do it. Thank you.

2 MS. ROBERTSON: I have a question.
3 The Team DUI, who is responsible for training them
4 about our program?

5 MR. COLLINS: I only have met with
6 them as part of a larger DUI initiative run by
7 PennDOT. So I mean, we've offered them material.
8 This isn't the only topic they cover. As drug
9 recognition experts, I believe they're - and others
10 on the Board would know more - that they're called
11 in to assist on instances where it's unclear as to
12 whether or not someone is in possession of something
13 or acting in a way they should not be. But they had
14 to ask for information. They've received it. In
15 the meeting I was present and the follow-up
16 conversation, they demonstrated tremendous
17 competency about the subject matter of this program.

18 MS. ROBERTSON: Thank you.

19 CHAIR: So we're pleased to engage,
20 yes, and so now we'll take the opportunity to
21 hearing views coming out of the Board.

22 MR. EVANCHICK: Thank you.

23 CHAIR: Thank you. Other points of
24 discussion? Yes?

25 MR. EVANCHICK: Just to talk about the

1 packaging materials and what it looks like that's
2 out there. We provide a bulletin out to law
3 enforcement. And we put pictures in there,
4 photographs, depictions and talk about what the
5 items would like. So we've been putting that
6 information out. We've probably been doing that for
7 the last year and a half at least. And everyone
8 once in a while I have them run that bulletin out
9 again. That information is on the app as well.

10 CHAIR: Thanks. Yes?

11 MR. SHULTZ: I'm glad to hear all
12 that. That's all good stuff. But it needs to
13 continue and we really need to make sure the
14 officers in the field understand what this program's
15 all about.

16 Referring to the recent court case,
17 the articles that I read included information about
18 - a female officer that was on site testified in a
19 preliminary hearing, that she did not know that dry-
20 leaf flower was available to patients in
21 Pennsylvania. So we need to keep those efforts
22 going.

23 CHAIR: Absolutely. Good idea. If I
24 did point out, there are - I mean, you might know
25 better, how many police officers, municipal police

1 officers, in Pennsylvania?

2 MR. COLLINS: So we can't see
3 everybody, but we are glad to train the trainers and
4 work with state police and the District Attorney
5 Association, Chiefs of Police Association to try to
6 get that word out.

7 CHAIR: Other thoughts? Yes, sir?

8 MR. SHULTZ: One other thing. I just
9 wanted to bring to the Board's attention that the
10 State of Maine offers reciprocity to our patients,
11 all patients from other states that have a medical
12 marijuana certification, in that they would
13 recognize that certification and allow those
14 patients, from the other states, to come in, access
15 their program through their dispensaries and buy
16 product. And I know they're working on setting that
17 up and I hope we can make that happen, which would
18 be a nice benefit for our patients.

19 CHAIR: So John is looking - we talked
20 about it yesterday. John is looking at that. If it
21 is technically possible to do, we will actually take
22 that decision to the Board for a vote of whether
23 that would be possible. So we're working on that.

24 MS. ROBERTSON: Is that - like, does
25 that swing both ways?

1 MR. COLLINS: No.

2 MS. ROBERTSON: We can't do that?

3 CHAIR: That would require change of
4 the legislature.

5 MS. ROBERTSON: Right. But - so this
6 would be for Pennsylvania patients going to Maine
7 and actually get medicine. I find a lot of people
8 are frustrated that, you know, medical marijuana
9 really works for them, but when they go away on
10 vacation, they - you know, I mean I know that's a
11 federal thing, but they're without their medicine.

12 CHAIR: It's very challenging. That
13 will continue until it's rescheduled by the
14 federal -

15 MS. ROBERTSON: I know.

16 CHAIR: - by the DEA. So until
17 there's some change in terms of the federal
18 recognition of medical marijuana programs and to
19 change the DEA designation, there's nothing we can
20 do with that.

21 MS. ROBERTSON: Right. But when there
22 are states that are offering programs like that,
23 it's a definite bonus.

24 CHAIR: So whether it be looking at
25 the technical aspect, that is it technically

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possible, we'll bring that to the Board for a vote.

MR. SHULTZ: Thank you.

MS. ROBERTSON: Thank you.

CHAIR: Anything else? All right.

May I have a motion to adjourn?

MR. EVANCHICK: So moved.

CHAIR: Second?

MS. JAMES: Second.

CHAIR: All in favor?

(WHEREUPON, AYES RESPOND.)

CHAIR: Any opposed? Any abstentions?

Thank you very much.

* * * * *

HEARING CONCLUDED AT 10:55 A.M.

* * * * *

CERTIFICATE

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I hereby certify that the foregoing proceeding was reported by me on 08/14/19 and that I, Hannah E. Rinaldo, read this transcript and that I attest that this transcript is a true and accurate record of the proceeding.
Dated the 6th day of September, 2019.

Hannah E. Rinaldo
Hannah E. Rinaldo,
Court Reporter



HEALTH CARE

THE LEAD

In one month, 3,000 Pennsylvanians with anxiety certified for medical marijuana

BY: SARAH ANNE HUGHES - AUGUST 14, 2019 11:44 AM



In the month since the Pennsylvania Department of Health added anxiety as a qualifying medical marijuana condition, 3,000 people have been certified to receive product for that disorder.

John Collins, director of the Office of Medical Marijuana, said at a Wednesday meeting of the Medical Marijuana Advisory Board that, in just the first few days, 212 people were certified for medical marijuana because of anxiety.

That number has been growing by about 1,000 people a week since certifications began July 20.

In July, Health Secretary Dr. Rachel Levine announced that anxiety and Tourette syndrome would be added to a list of more than 20 qualifying medical marijuana conditions. Pennsylvania's program formally began on Feb. 15, 2018.

At the moment, Collins said, 180,000 patients and 20,000 caregivers are registered in the system. Roughly 121,000 patients are actively purchasing product.

That's translated into about \$200 million in sales by dispensaries to patients, Collins said. Sales from medical marijuana grower/processors to dispensaries total \$150 million.

Levine said Wednesday she offered guidance to physicians and dispensaries about the type of marijuana that has been shown to be therapeutic for anxiety disorder: product with low THC and high CBD. She also stressed that patients should continue with therapy and counseling.

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SARAH ANNE HUGHES



Associate Editor Sarah Anne Hughes covers the governor and Pennsylvania's agencies. Before joining the *Capital-Star*, she was the state capitol reporter for *Billy Penn* and *The Incline*, and a 2018 corps member for Report for America. She was previously managing editor of *Washington City Paper*, editor-in-chief of *DCist*, and a national blogger for *The Washington Post*.

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[Pennsylvania Capital-Star, 2021](#)

FACTUAL BACKGROUND

On May 21, 2021, the Request was filed, stating:

I am writing to request[] records detailing the number of medical marijuana patients in each county.

On Tuesday, the Medical Marijuana Advisory Board was told that there are 10 counties where there are at least 2,000 medical marijuana patients and the county doesn't have a dispensary.

Based on that revelation, it is clear that [the Department] has records detailing the number of patients per county. As a result, I would like to be provided the data for each county.

On May 27, 2021, the Department denied the Request, stating that the information is confidential under the Medical Marijuana Act, 35 P.S. § 1023.302(a).

On June 1, 2021, the Requester appealed to the OOR, challenging the denial and stating grounds for disclosure.¹ The OOR invited both parties to supplement the record and directed the Department to notify any third parties of their ability to participate in the appeal. *See* 65 P.S. § 67.1101(c).

On June 24, 2021, the Department submitted a position statement, reiterating its reason for denial.

LEGAL ANALYSIS

“The objective of the Right to Know Law ... is to empower citizens by affording them access to information concerning the activities of their government.” *SWB Yankees L.L.C. v. Wintermantel*, 45 A.3d 1029, 1041 (Pa. 2012). Further, this important open-government law is “designed to promote access to official government information in order to prohibit secrets, scrutinize the actions of public officials and make public officials accountable for their

¹ The Requester provided the OOR with additional time to issue a final determination in this matter. *See* 65 P.S. § 67.1101(c).

actions.” *Bowling v. Office of Open Records*, 990 A.2d 813, 824 (Pa. Commw. Ct. 2010), *aff’d* 75 A.3d 453 (Pa. 2013).

The OOR is authorized to hear appeals for all Commonwealth and local agencies. See 65 P.S. § 67.503(a). An appeals officer is required “to review all information filed relating to the request.” 65 P.S. § 67.1102(a)(2). An appeals officer may conduct a hearing to resolve an appeal. The decision to hold a hearing is discretionary and non-appealable. *Id.* Here, neither party requested a hearing.

The Department is a Commonwealth agency subject to the RTKL that is required to disclose public records. 65 P.S. § 67.301. Records in the possession of a Commonwealth agency are presumed public unless exempt under the RTKL or other law or protected by a privilege, judicial order or decree. See 65 P.S. § 67.305. Upon receipt of a request, an agency is required to assess whether a record requested is within its possession, custody or control and respond within five business days. 65 P.S. § 67.901. An agency bears the burden of proving the applicability of any cited exemptions. See 65 P.S. § 67.708(b).

Section 708 of the RTKL places the burden of proof on the public body to demonstrate that a record is exempt. In pertinent part, Section 708(a) states: “(1) The burden of proving that a record of a Commonwealth agency or local agency is exempt from public access shall be on the Commonwealth agency or local agency receiving a request by a preponderance of the evidence.” 65 P.S. § 67.708(a). Preponderance of the evidence has been defined as “such proof as leads the fact-finder ... to find that the existence of a contested fact is more probable than its nonexistence.” *Pa. State Troopers Ass’n v. Scolforo*, 18 A.3d 435, 439 (Pa. Commw. Ct. 2011) (quoting *Pa. Dep’t of Transp. v. Agric. Lands Condemnation Approval Bd.*, 5 A.3d 821, 827 (Pa. Commw. Ct. 2010)).

The Department argues that the requested information is confidential under Section 302 of the Medical Marijuana Act, titled “Confidentiality and public disclosure,” which provides:

(a) Patient information. – The [D]epartment shall maintain a confidential list of patients and caregivers to whom it has issued identification cards. All information obtained by the [D]epartment relating to patients, caregivers and other applicants shall be confidential and not subject to public disclosure, including disclosure under the ... [RTKL], including:

- (1) Individual identifying information about patients and caregivers.
- (2) Certifications issued by practitioners.
- (3) Information on identification cards.
- (4) Information provided by the Pennsylvania State Police under section 502(b).
- (5) Information relating to the patient’s serious medical condition.

(b) Public information. – The following records are public records and shall be subject to the [RTKL]:

- (1) Applications for permits submitted by medical marijuana organizations.
- (2) The names, business addresses and medical credentials of practitioners authorized to provide certifications to patients to enable them to obtain and use medical marijuana in this Commonwealth. All other practitioner registration information shall be confidential and exempt from public disclosure under the [RTKL].
- (3) Information relating to penalties or other disciplinary actions taken against a medical marijuana organization or practitioner by the [D]epartment for violation of this act.

35 P.S. § 10231.302. The Department reasons that because the information constitutes “information obtained by the [D]epartment relating to patients” under subsection (a) and because it is not included in subsection (b)’s list of public information, it is confidential. Further, the Department notes that disclosure of “any information related to the use of medical marijuana” by Department employees is a misdemeanor of the third degree under the Medical Marijuana Act. 35 P.S. § 10231.1307(a).

The Department is correct that the requested information is not included in subsection (b), as set forth above. However, subsection (b) is not an exhaustive list of public records under the Medical Marijuana Act. If the General Assembly intended the list to be exhaustive, it could have done so, by noting that only three categories of records regarding the medical marijuana program may be disclosed. Without such language, subsection (b) appears to be strictly illustrative, in that the General Assembly intended to highlight specific records that may be disclosed. Any records not confidential under subsection (a), and not otherwise discussed under subsection (b), are still presumed to be public records, and subject to the RTKL. *See* 65 P.S. § 67.305(a).

The overarching question before the OOR is whether the requested information – aggregate data consisting of the number of patients broken down by county – is “information ... relating to patients, caregivers, and other applicants....” 35 P.S. § 10231.302(a). It is difficult to believe that the General Assembly intended the release of aggregate data concerning the medical marijuana program to be a crime, and the context of Section 302 does not support the Department’s broad interpretation. Subsection (a) begins with discussing “a confidential list of patients and caregivers,” and concludes by providing a non-exhaustive list of examples of records that are subject to confidentiality, all of which concern the identification of specific patients and caregivers. The heading of subsection (a) is “Patient information.”² Based upon this context, the OOR can only conclude that subsection (a) concerns information and records relating to specific patients and caregivers, rather than information in the aggregate about the program.³ Thus, this is the reason why Section 1307 of the Medical Marijuana Act criminalizes the disclosure of “any

² Headings “shall not be considered to control but may be used to aid in the construction thereof.” 1 Pa.C.S. § 1924.

³ Although no longer in effect, the Department’s temporary regulations that it previously enacted concerning the Medical Marijuana Act support this conclusion. Those temporary regulations, while expanding upon the examples of confidential records set forth in 35 P.S. § 10231.302(a), concern information regarding specific patients, caregivers, and applicants and did not cover any information in the aggregate. 28 Pa. Code § 1141.22 (expired May 12, 2020).

information *related to the use of medical marijuana*” (emphasis added) – the General Assembly was concerned about the disclosure of information regarding patients and caregivers, rather than all information concerning the program.

Finding the requested aggregated data to be confidential would lead to an absurd result. Under such a broad reading of confidentiality, information such as the total number of Pennsylvanians using the medical marijuana program would be confidential and disclosure of that figure could result in criminal sanctions. The OOR cannot conclude that this was the General Assembly’s intent. Instead, based upon the context set forth in Section 302 of the Medical Marijuana Act, the requested information is subject to public access.

CONCLUSION

For the foregoing reasons, the Requester’s appeal is **granted**, and the Department is required to provide the requested information to the Requester within thirty days. This Final Determination is binding on all parties. Within thirty days of the mailing date of this Final Determination, any party may appeal to the Commonwealth Court. 65 P.S. § 67.1301(a). All parties must be served with notice of the appeal. The OOR also shall be served notice and have an opportunity to respond as per Section 1303 of the RTKL. However, as the quasi-judicial tribunal adjudicating this matter, the OOR is not a proper party to any appeal and should not be named as a party.⁴ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: July 15, 2021

/s/ Kyle Applegate

CHIEF COUNSEL
KYLE APPLGATE, ESQ.

⁴ *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).

Sent to: John Finnerty (via email only);
Shea Skinner, Esq. (via email only);
Christopher Gleeson, Esq. (via email only)

ED MAHON,
SPOTLIGHT PA,
vs.
PENNSYLVANIA DEPARTMENT
OF HEALTH,

Docket No. AP 2021-1296

I, Ed Mahon, under penalty of perjury, pursuant to 18 Pa. C.S. § 4904 relating to unsworn falsification to authorities, do hereby affirm and state that all factual averments made in my response to the above-captioned appeal and, specifically, the following averments, are true and correct to the best of my knowledge, information and belief:

1. A spokesperson for the Department of Health did email me on July 27, 2021, and the department spokesperson did state that the top three medical conditions in the state's medical marijuana program are chronic pain, anxiety disorders, and post-traumatic stress disorders.
2. The meeting minutes I submitted for consideration were provided to me by the Department of Health in July of 2021.
3. The Office of Open Records final determination I provided was downloaded from the office website in July of 2021.
4. The news article I included was downloaded from that website on July 30, 2021.
5. And the Wolf administration exhibit I provided was downloaded from the state government website on July 30, 2021.
6. I have not altered those documents or redacted information from them.

Ed Mahon



00R EXHIBIT 5

Isenberg, Kelly

From: Gleeson, Christopher
Sent: Friday, July 30, 2021 3:16 PM
To: Isenberg, Kelly; Mahon, Ed
Cc: PADOHRTK; Keefer, Lisa; Skinner, Shea; Hoppes, Danica
Subject: RE: [External] Re: Corrected: Mahon v. DOH: AP 2021-1296
Attachments: OOR Response.pdf; Keefer Affidavit Mahon.pdf

Good afternoon Attorney Isenberg and Mr. Mahon,

Attached please find the response on behalf of the Department with regards to the above-captioned appeal.

Please let me know if you have any questions as to the same.

Thank you.

Christopher J. Gleeson | Assistant Counsel
Pennsylvania Department of Health
Office of Legal Counsel
Room 825 | Health and Welfare Building
625 Forster Street | Harrisburg, PA 17120
Ph: 717-783-2500 | Fax: 717-705-6042
www.health.pa.gov

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From: Mahon, Ed <emahon@spotlightpa.org>
Sent: Friday, July 30, 2021 12:57 PM
To: Isenberg, Kelly <kisenberg@pa.gov>
Cc: DC, OpenRecords <RA-OpenRecords@pa.gov>; PADOHRTK <PADOHRTK@pa.gov>; Keefer, Lisa <likeefer@pa.gov>
Subject: Re: [External] Re: Corrected: Mahon v. DOH: AP 2021-1296

Hello: As the deadline is July 30, 2021, for the following case (Mahon and Spotlight PA v. Pennsylvania Department of Health OOR Dkt. AP 2021-1296.) I'll be providing some information.

1.) I have attached a recent decision from the Office of Open Records that deals with substantially similar issues. That request sought aggregate data as does mine. I'm asking you to consider the entire order, specifically the following statement:

"Finding the requested aggregated data to be confidential would lead to an absurd result. Under such a broad reading of confidentiality, information such as the total number of Pennsylvanians using the medical marijuana program would be confidential and disclosure of that figure could result in criminal sanctions. The OOR cannot conclude that this was the General Assembly's intent. Instead, based upon the context set forth in Section 302 of the Medical Marijuana Act, the requested information is subject to public access." (Page 6 of attachment 2021-1061_Finnerty-DOH_FD.pdf)

2.) Please also consider this May 2019 news article in which a department official released aggregate data on patients with anxiety disorder certified for cannabis:

COMMONWEALTH OF PENNSYLVANIA
OFFICE OF OPEN RECORDS

ED MAHON,
SPOTLIGHT PA,
Requester,

Docket No. AP 2021-1296

v.

PENNSYLVANIA DEPARTMENT
OF HEALTH,
Respondent.

DEPARTMENT OF HEALTH'S RESPONSE AND LEGAL ARGUMENT
IN SUPPORT OF ITS DENIAL OF ED MAHON'S RIGHT-TO-KNOW
LAW REQUEST

Pursuant to the Office of Open Records' (OOR) July 2, 2021 letter, sections 1101 and 1102 of the Right-to-Know Law (RTKL), 65 P.S. §§ 67.1101-67.1102, and OOR's *Appeal Process – Interim Guidelines*, the Department of Health (Department) files this Brief in Support of its Final Response to the RTKL Request of Ed Mahon (Mahon).

Procedural and Factual History

This appeal arises from the Department's denial of a written request for records under the RTKL, 65 P.S. § 67.101, *et seq.*, filed by Mahon. The Department received request number DOH-RTKL-MM-022-2021 on June 15, 2021. Mahon requested:

1. Aggregate data for the number of medical marijuana certification issues for each of the eligible qualifying conditions. As of June 15, 2021, the Department of Health website describes the following:

Only patients suffering from one of the following medical conditions can participate in Pennsylvania's medical marijuana program:

- Amyotrophic lateral sclerosis.
 - Anxiety disorders.
 - Autism.
 - Cancer, including remission therapy.
 - Crohn's disease.
 - Damage to the nervous tissue of the central nervous system (brain-spinal cord) with objective neurological indication of intractable spasticity, and other associated neuropathies.
 - Dyskinetic and spastic movement disorders.
 - Epilepsy.
 - Glaucoma.
 - HIV / AIDS.
 - Huntington's disease.
 - Inflammatory bowel disease.
 - Intractable seizures.
 - Multiple sclerosis.
 - Neurodegenerative diseases.
 - Neuropathies.
 - Opioid use disorder for which conventional therapeutic interventions are contraindicated or ineffective, or for which adjunctive therapy is indicated in combination with primary therapeutic interventions.
 - Parkinson's disease.
 - Post-traumatic stress disorder.
 - Severe chronic or intractable pain of neuropathic origin or severe chronic or intractable pain.
 - Sickle cell anemia.
 - Terminal illness.
 - Tourette syndrome.
2. Any written policies or procedures describing how the Department of Health tracks the use of its medical marijuana program, including which qualifying conditions are certified.

On June 23, 2021, the Department's Agency Open Records Officer mailed Mahon the Department's Final Response (Final Response) denying paragraph 1 of the request on the basis that the records sought are confidential under the Medical Marijuana Act, 35 P.S. § 10231.302. After the Department searched for records responsive to paragraph 2 of the request, it was determined that no responsive records existed within the custody or control of the Department.¹ Affidavit of Lisa Keefer dated July 30, 2021. As set forth more fully below, the withheld records in paragraph 1 are not public records and the OOR should affirm the Department's denial of Mahon's request.

1. Disclosure of the requested records is prohibited by the Medical Marijuana Act.

The RTKL presumes that records in the possession of Commonwealth agencies are public records, unless the records in question are, *inter alia*, "exempt from being disclosed under any other Federal or State law or regulation or judicial order or decree." 65 P.S. §§ 67.102, 67.305, 67.306.

In this instance, the records sought are expressly deemed confidential under the Commonwealth's Medical Marijuana Act, 35 P.S. § 10231.101, *et seq.* Section

¹ The Department possesses no policies or procedures responsive to Mahon's request. *See* 35 P.S. § 10231.702 regarding policies and procedures to track medical marijuana.

302 of the Medical Marijuana Act distinguishes between public and confidential information as follows:

(a) Patient information.—The department shall maintain a confidential list of patients and caregivers to whom it has issued identification cards. *All information obtained by the department relating to patients, caregivers and other applicants shall be confidential and not subject to public disclosure, including disclosure under the act of February 14, 2008 (P.L. 6, No. 3), known as the Right-to-Know Law, including:*

- (1) Individual identifying information about patients and caregivers.
- (2) Certifications issued by practitioners.
- (3) Information on identification cards.
- (4) Information provided by the Pennsylvania State Police under section 502(b).
- (5) *Information relating to the patient's serious medical condition.*

(b) Public information.—The following records are public records and shall be subject to the Right-to-Know Law:

- (1) Applications for permits submitted by medical marijuana organizations.

(2) The names, business addresses and medical credentials of practitioners authorized to provide certifications to patients to enable them to obtain and use medical marijuana in this Commonwealth. All other practitioner registration information shall be confidential and exempt from public disclosure under the Right-to-Know Law.

(3) Information relating to penalties or other disciplinary actions taken against a medical marijuana organization or practitioner by the department for violation of this act.

35 P.S. § 10231.302 (emphasis added).

Section 302 of the Medical Marijuana Act expressly and unambiguously precludes disclosure of “[a]ll information obtained by the [D]epartment relating to patients, caregivers and other applicants,” while providing a *non-exhaustive* list of examples of confidential materials. *Id.* Section 302 also readily identifies what *is* considered public under the Medical Marijuana Act and accordingly subject to the RTKL. Notably, this does not include the records subject to the instant appeal.

Here, Mahon seeks “[a]ggregate data for the number of medical marijuana certification issues for each of the eligible qualifying conditions.” Not only is this information absent from the enumerated list of public records under the Medical Marijuana Act, but it falls plainly within the universe of “all information obtained

by the department relating to patients, caregivers and other applicants,” which is “confidential and not subject to public disclosure.” *Id.* Significantly, the information sought is included in the list of examples the Act identifies as confidential – i.e., “information relating to the patient’s serious medical condition.” 35 P.S. § 10231.302(a)(5).

While no Pennsylvania appellate court has yet examined the general confidentiality provision contained in the Medical Marijuana Act, the Commonwealth Court recently held that similar language in the Crime Victims Act prohibited the disclosure of even aggregate information.² *Feldman v. Pa. Comm’n on Crime and Delinquency*, 208 A.3d 167 (Pa. Cmwlth. 2019). In *Feldman*, the Crime Victims Act made confidential “all reports, records or information obtained or produced during the processing or investigation of a claim.” 18 P.S. § 11.709(a). The language in the Medical Marijuana Act is nearly identical to the language of the Crime Victims Act. (*Compare* “all information obtained by the department relating

² The court in *Feldman* found:

Demographic data submitted by claimants regarding their race/ethnicity, age, and/or gender qualifies as information obtained by the Commission during the processing of claims and information regarding the reason for denial qualifies as information produced during the processing or investigation of a claim; thus, this information must be kept confidential. Because section 709 of the Crime Victims Act mandates that all information obtained or produced by the Commission shall remain confidential, such information is not subject to disclosure under the RTKL. *See* Section 306 of the RTKL, 65 P.S. § 67.306.

Feldman at 175.

to patients” *with* “all...information obtained...during the processing or investigation of a claim.”)

Finally, the Medical Marijuana Act provides that unlawful disclosure of this information constitutes a third-degree misdemeanor:

(a) Offense defined.--In addition to any other penalty provided by law, an employee, financial backer, operator or principal of any of the following commits a misdemeanor of the third degree if the person discloses, except to authorized persons for official governmental or health care purposes, *any information related to the use of medical marijuana*:

- (1) A medical marijuana organization.
- (2) A health care medical marijuana organization or university participating in a research study under Chapter 19.
- (3) A clinical registrant or academic clinical research center under Chapter 20.
- (4) *An employee of the department.*

(b) Exception.--Subsection (a) shall not apply where disclosure is permitted or required by law or by court order. The department, including an authorized employee, requesting or obtaining information under this act shall not be subject to any criminal liability. The

immunity provided by this subsection shall not apply to any employee of the department who knowingly and willfully discloses prohibited information under this act.

35 P.S. § 10231.1307 (emphasis added).

Conclusion

For the reasons stated above, the OOR should affirm the Department's denial of Mahon's request and deny the instant appeal.

Respectfully submitted,

/s/ Christopher J. Gleeson

Christopher J. Gleeson
Assistant Counsel
Attorney I.D. 318583

/s/ Shea M. Skinner

Shea M. Skinner
Assistant Counsel
Attorney I.D. 326121

Office of Legal Counsel
Department of Health
825 Health and Welfare Building
625 Forster Street
Harrisburg, PA 17120
Phone: (717) 783-2500

Date: July 30, 2021

**COMMONWEALTH OF PENNSYLVANIA
OFFICE OF OPEN RECORDS**

**ED MAHON,
SPOTLIGHT PA,
Requester,**

Docket No. AP 2021-1296

v.

**PENNSYLVANIA DEPARTMENT
OF HEALTH,
Respondent.**

**DEPARTMENT OF HEALTH'S AFFIDAVIT OF LISA KEEFER, AGENCY OPEN
RECORDS OFFICER**

I, Lisa Keefer, Agency Open Records Officer, Pennsylvania Department of Health (Agency), under penalty of perjury, pursuant to 18 Pa. C.S. § 4904 relating to unsworn falsification to authorities, do hereby affirm and state that all factual averments made in the Department's response to the above-captioned appeal and, specifically, the following averments, are true and correct to the best of my knowledge, information and belief:

1. I am employed by the Pennsylvania Department of Health as the Agency Open Records Officer.
2. I am responsible for responding to Right-to-Know requests filed with the Agency.
3. In my capacity as the Open Records Officer, I am familiar with the records of the Agency.
4. Upon receipt of the underlying request, docketed at DOH-RTKL-MM-022-2021, I performed a comprehensive search for responsive records in the Department's possession.

5. As a result of that search, I have been advised that the records sought by paragraph 2 of the underlying request do not exist, as there are no “written policies or procedures describing how the Department . . . tracks the use of its medical marijuana program . . .”

6. The above-described search of the Department’s records reveals that the records requested do not exist and are therefore not the within Department’s possession, custody, or control.

/s/ Lisa Keefer
Lisa Keefer
Agency Open Records Officer
Pennsylvania Department of Health

July 30, 2021

00R EXHIBIT 6

Isenberg, Kelly

From: Mahon, Ed <emahon@spotlightpa.org>
Sent: Friday, July 30, 2021 5:42 PM
To: Isenberg, Kelly
Subject: Re: [External] Re: Corrected: Mahon v. DOH: AP 2021-1296

I agree to that proposed schedule. (FYI. I'll be on vacation the week of Aug. 9 through Aug. 13, but it seems that I won't need to see the final response from the department as it will be focused on responses raised by my supplemental submission.) Thank you!

On Fri, Jul 30, 2021 at 4:27 PM Isenberg, Kelly <kisenberg@pa.gov> wrote:

Mr. Mahon:

I am confirming receipt of your request to submit a reply to the Department's appeal submission. We are amenable to your request; however, as the Department bears the burden of proof on appeal, we must provide the opportunity for the Department to respond to any new issues raised by your reply.

We propose the following briefing schedule:

Mr. Mahon – submits a reply by August 6, 2021.

Mr. Gleeson – submits a response limited to any new issues raised by Mr. Mahon's supplemental submission by Aug. 11, 2021.

The Final Determination will be issued on or before Sept. 2, 2021.

Kindly reply whether you agree to the proposed schedule by the close of business on Mon., Aug. 2, 2021.

Best regards,

Isenberg, Kelly

From: Mahon, Ed <emahon@spotlightpa.org>
Sent: Friday, July 30, 2021 3:43 PM
To: Gleeson, Christopher
Cc: Isenberg, Kelly; PADOHRTK; Keefer, Lisa; Skinner, Shea; Hoppes, Danica
Subject: Re: [External] Re: Corrected: Mahon v. DOH: AP 2021-1296
Attachments: Doc Jul 30, 2021, 3.40.pdf

Good afternoon:

- 1.) I would like to request a week to review and respond to the case law that the department is citing, "Feldman v. Pa. Comm'n on Crime and Delinquency, 208 A.3d." I would provide a response by noon on Aug. 6.
- 2.) I've included a signed form attesting to the accuracy of the exhibits I offered in my earlier email.

Thanks,

On Fri, Jul 30, 2021 at 3:15 PM Gleeson, Christopher <cgleeson@pa.gov> wrote:

Good afternoon Attorney Isenberg and Mr. Mahon,

Attached please find the response on behalf of the Department with regards to the above-captioned appeal.

Please let me know if you have any questions as to the same.

Thank you.

Christopher J. Gleeson | Assistant Counsel

Pennsylvania Department of Health

Office of Legal Counsel

Room 825 | Health and Welfare Building

625 Forster Street | Harrisburg, PA 17120

Ph: 717-783-2500 | Fax: 717-705-6042

www.health.pa.gov

00R EXHIBIT 7

Isenberg, Kelly

From: Mahon, Ed <emahon@spotlightpa.org>
Sent: Friday, July 30, 2021 9:41 PM
To: Isenberg, Kelly
Cc: Gleeson, Christopher; PADOHRTK; Keefer, Lisa; Skinner, Shea; Hoppes, Danica
Subject: Re: [External] Re: Corrected: Mahon v. DOH: AP 2021-1296

Follow Up Flag: Follow up
Flag Status: Flagged

Hello, all:

The below information was brought to my attention today. It is a presentation from a Medical Marijuana Advisory Board meeting. It is dated February 13, 2020. It is available on the department website. Page 24 includes percentages, broken down by condition and ranked.

<https://www.health.pa.gov/topics/Documents/Programs/Medical%20Marijuana/Medical%20Marijuana%20Advisory%20Board%20Presentation%20Feb.%202013,%202020.pdf>

The information is available on the Department of Health website, under "MMAB Presentation - August. 11, 2020"
<https://www.health.pa.gov/topics/programs/Medical%20Marijuana/Pages/Advisory-Board.aspx>

I am providing this as another example of comparable information being released. As it is still July 30, 2021, I believe this submission still falls under the original deadline.

On Fri, Jul 30, 2021 at 4:27 PM Isenberg, Kelly <kisenberg@pa.gov> wrote:

Mr. Mahon:

I am confirming receipt of your request to submit a reply to the Department's appeal submission. We are amenable to your request; however, as the Department bears the burden of proof on appeal, we must provide the opportunity for the Department to respond to any new issues raised by your reply.

We propose the following briefing schedule:

Mr. Mahon – submits a reply by August 6, 2021.

Mr. Gleeson – submits a response limited to any new issues raised by Mr. Mahon's supplemental submission by Aug. 11, 2021.

**Medical Marijuana Advisory
Board Meeting**

**Thursday, Feb. 13, 2020
10:00am – noon**



Program Feedback Survey

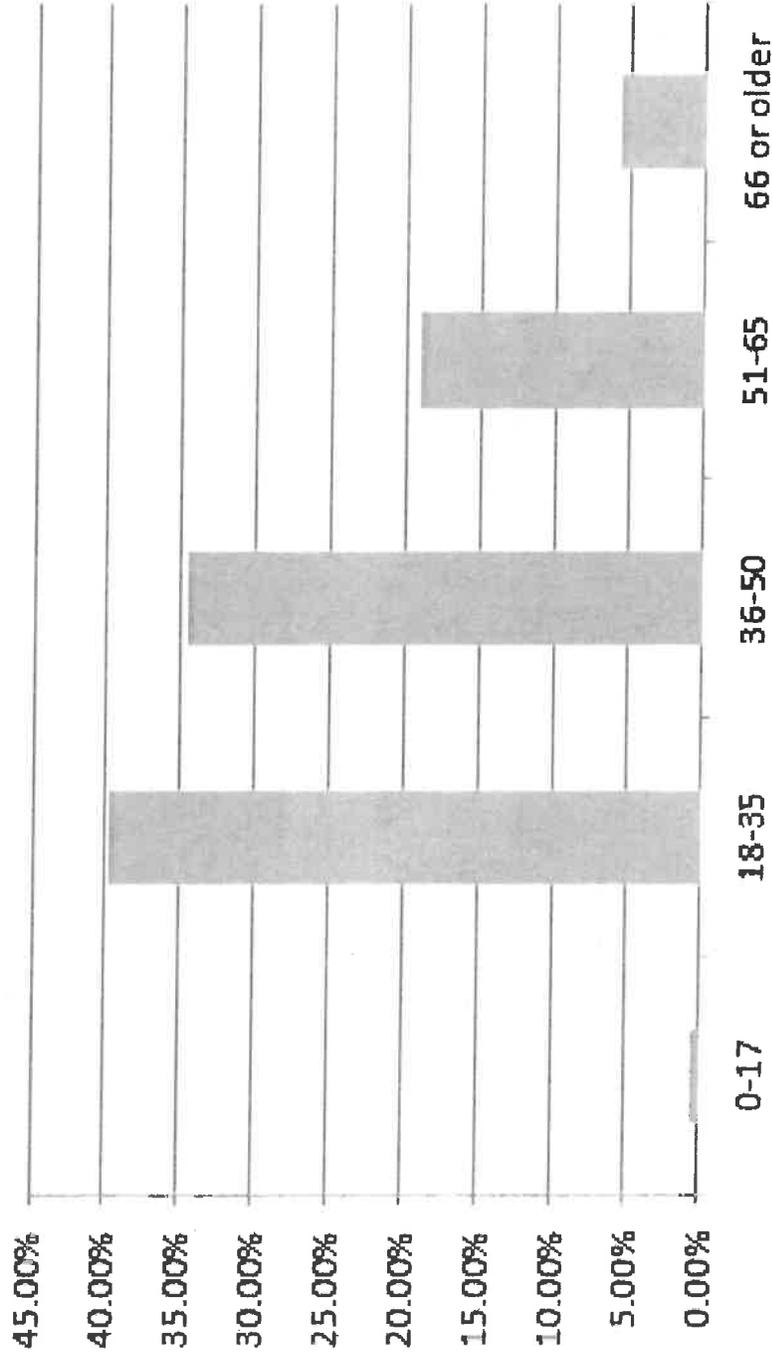
One of the duties of the Pa Medical Marijuana Advisory Board is to accept and review comments from individuals and organization about medical marijuana. As part of that duty, the Patient and Caregiver Subcommittee of the Advisory Board will seek to gather comments and information from patients, caregivers and other stakeholders through a series of on-line surveys.

Participation in this effort is anonymous and encouraged to help provide valuable information and understanding of how the Pennsylvania Medical Marijuana Program is serving our community and how it can be improved.

Three thousand, two hundred and one people filled out the survey between January 9th and January 28th, when we pulled the data that is being shared in this presentation.

Program Feedback Survey

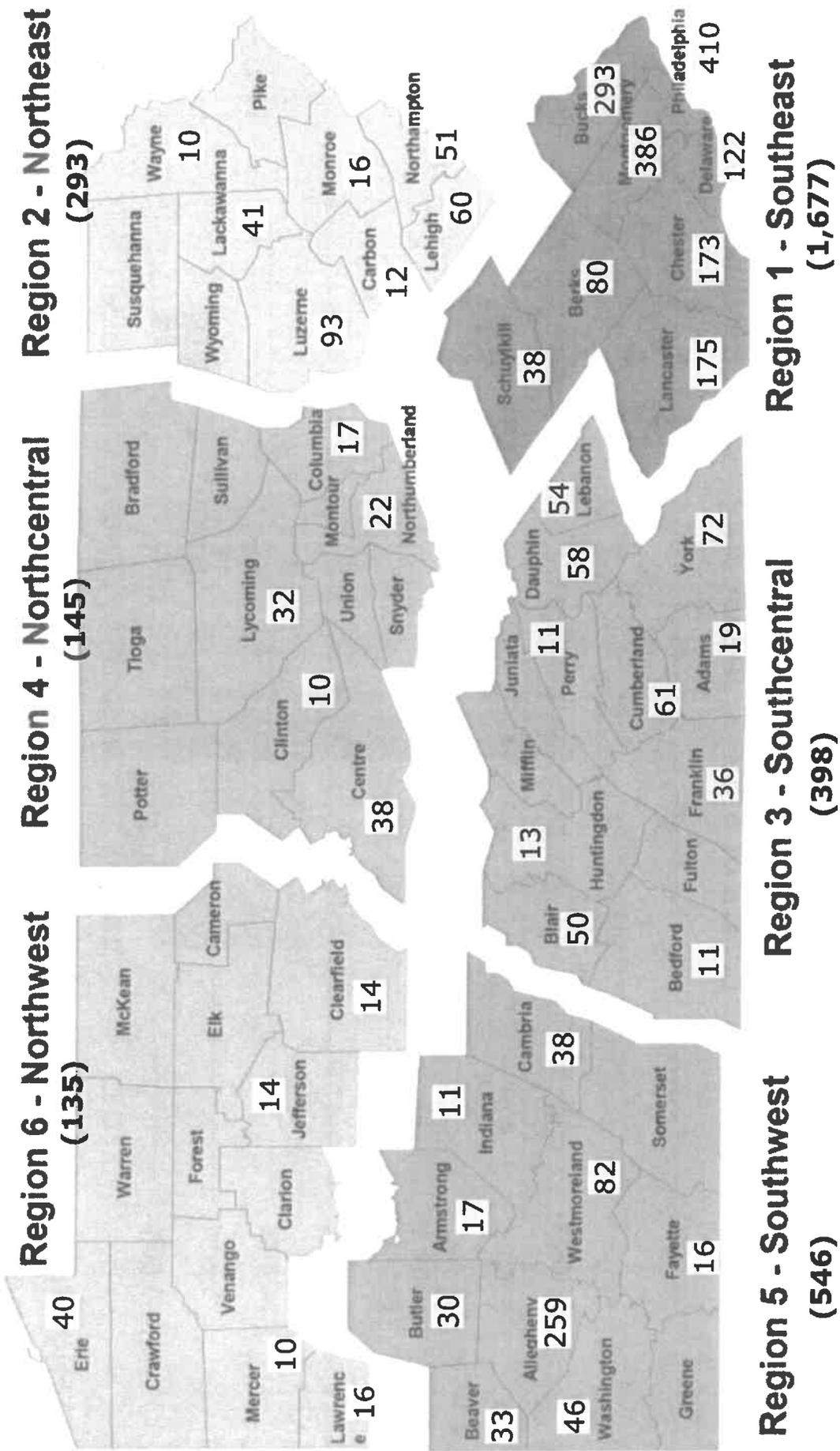
What is your age? (Caregivers of minors, please fill this out on their behalf.)



The survey was completed by caregivers for 20 minors under the age of 18. Respondents between the ages 18 and 35 totaled 1270, 1107 respondents were between ages 36 and 50, 614 respondents were between ages 51 and 65, and 184 respondents were 66 or older. Six people skipped this question.

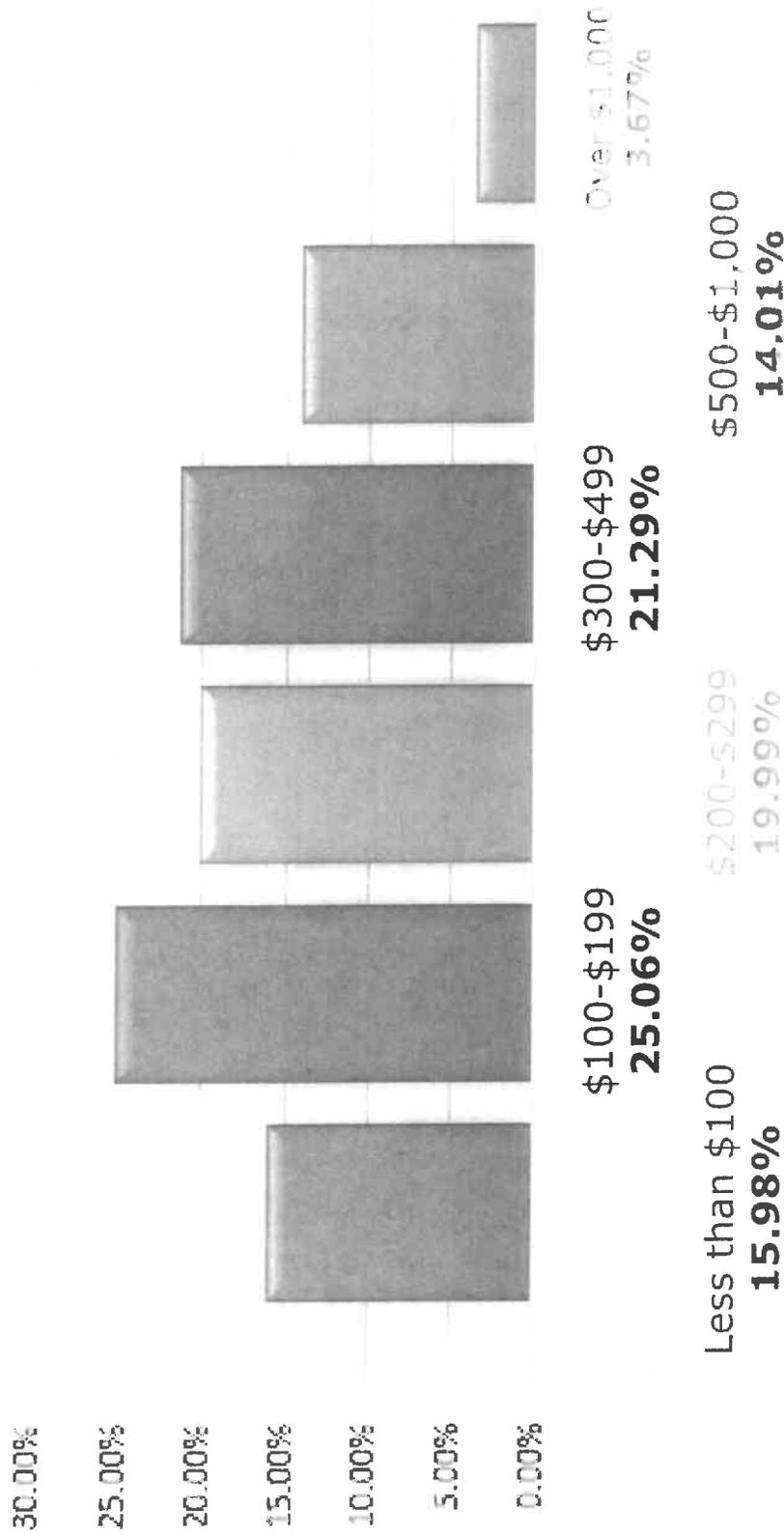


Program Feedback Survey



Program Feedback Survey

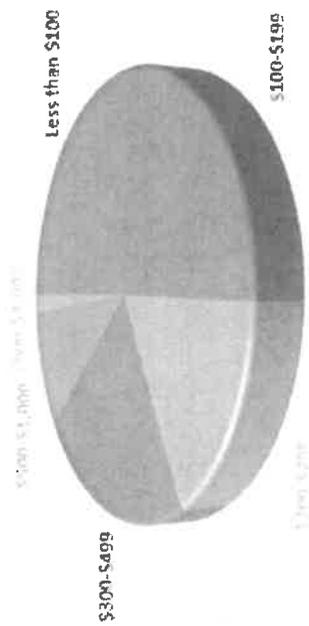
On average, the amount of money I spend on medical marijuana products per month is:



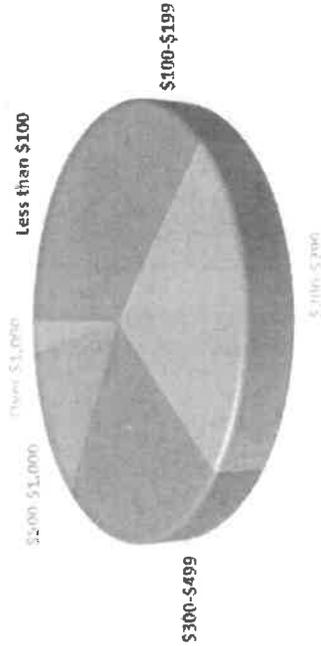
Program Feedback Survey

On average, the amount of money I spend on medical marijuana products per month is:

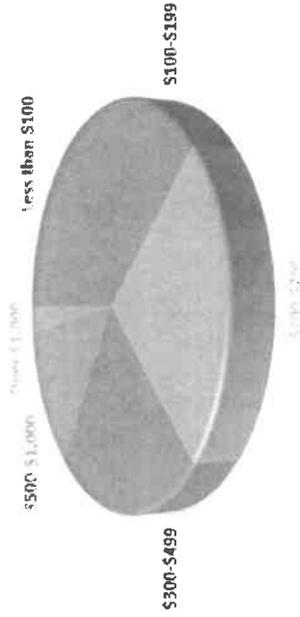
Region 6



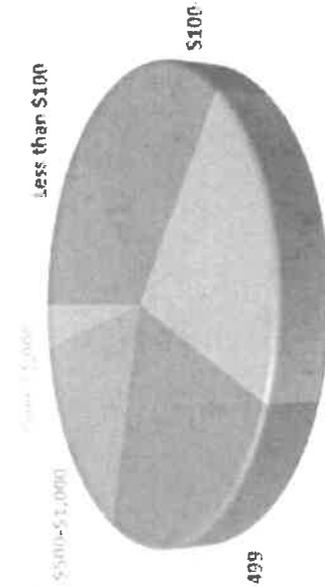
Region 4



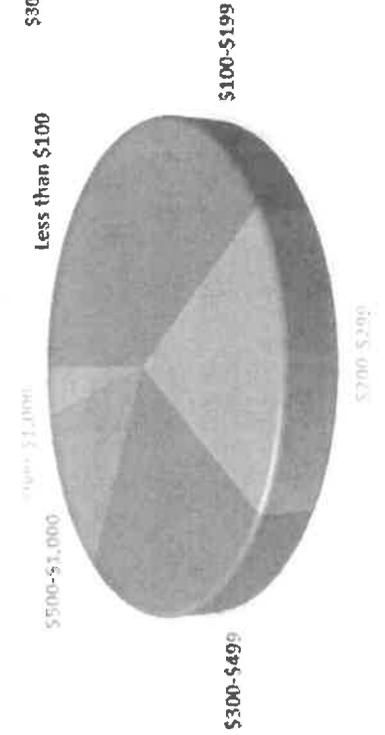
Region 2



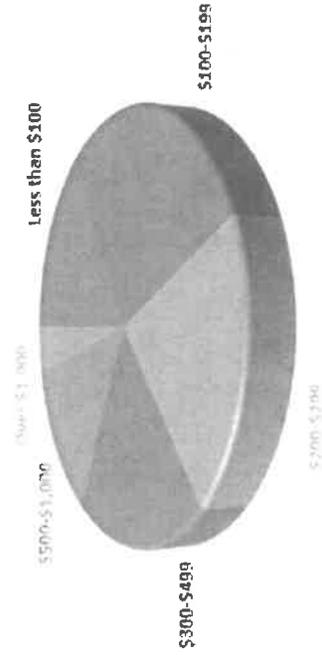
Region 5



Region 3



Region 1



pennsylvania
DEPARTMENT OF HEALTH

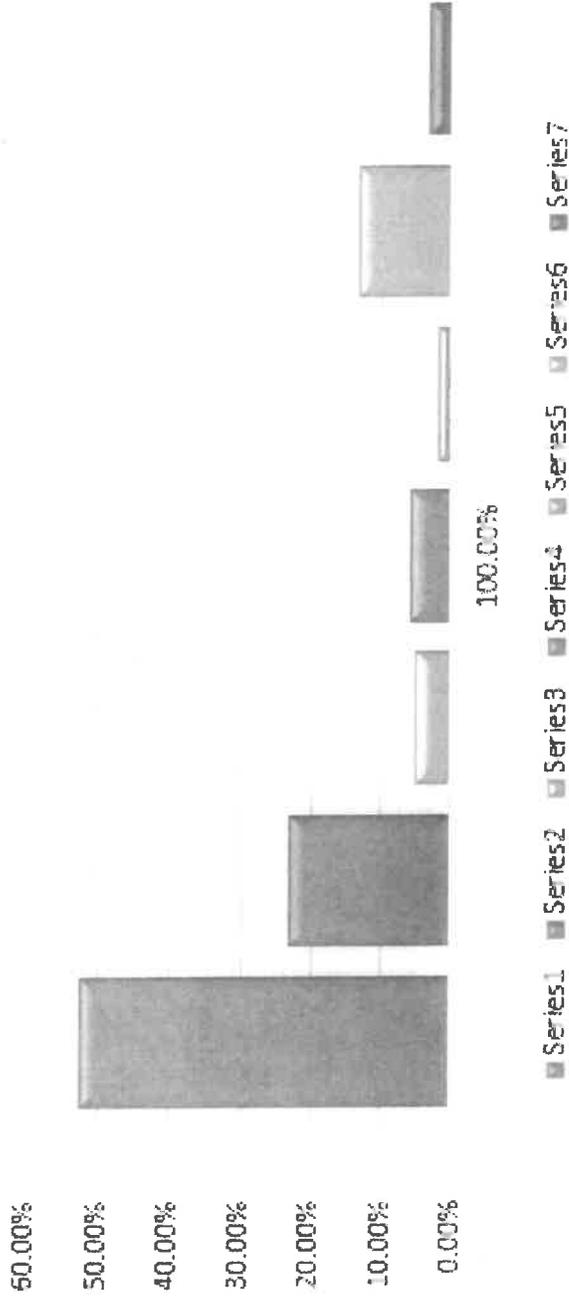
Program Feedback Survey

My preferred products form is:

(Please rank in order with the numbers 1-7, with 1 being your most preferred product.)



Most preferred product choices



Dry Leaf Vaporization Tinctures RSO syringes Topicals Concentrates Capsules
cartridges/pods



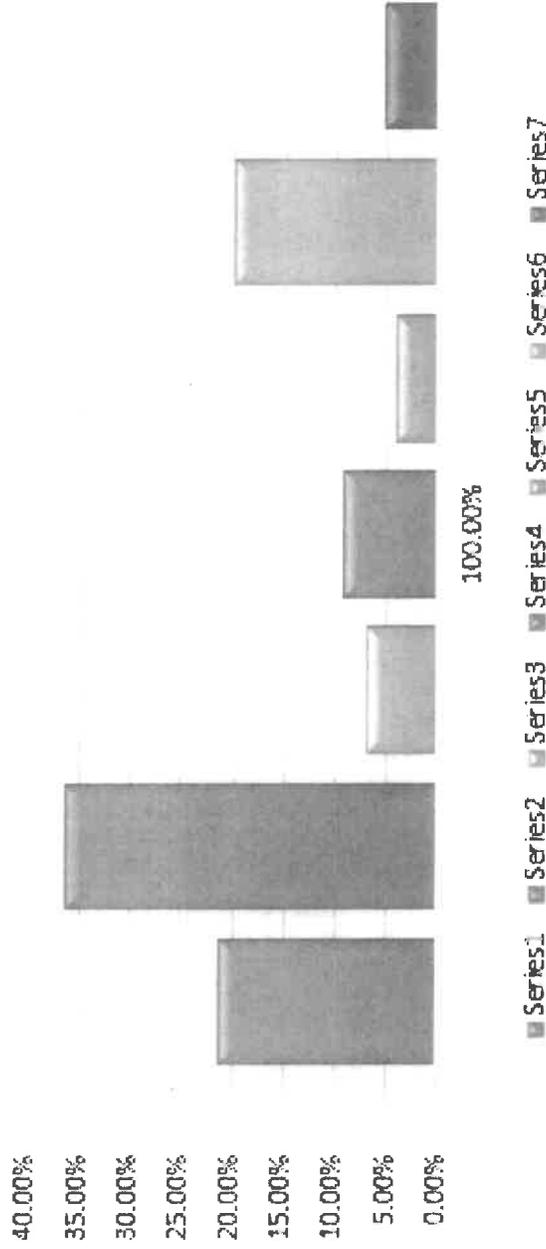
Program Feedback Survey

My preferred products form is:

(Please rank in order with the numbers 1-7, with 1 being your most preferred product.)



Second most preferred product choices



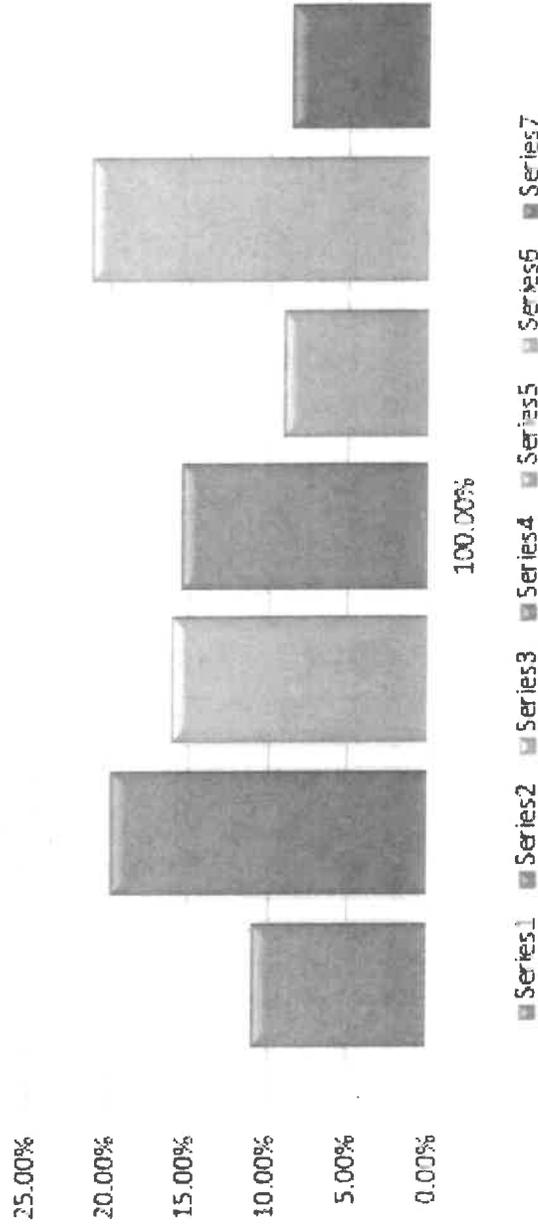
Dry Leaf Vaporization Tinctures RSO syringes Topicals Concentrates Capsules
 cartridges/pods



Program Feedback Survey

My preferred products form is:

(Please rank in order with the numbers 1-7, with 1 being your most preferred product.)



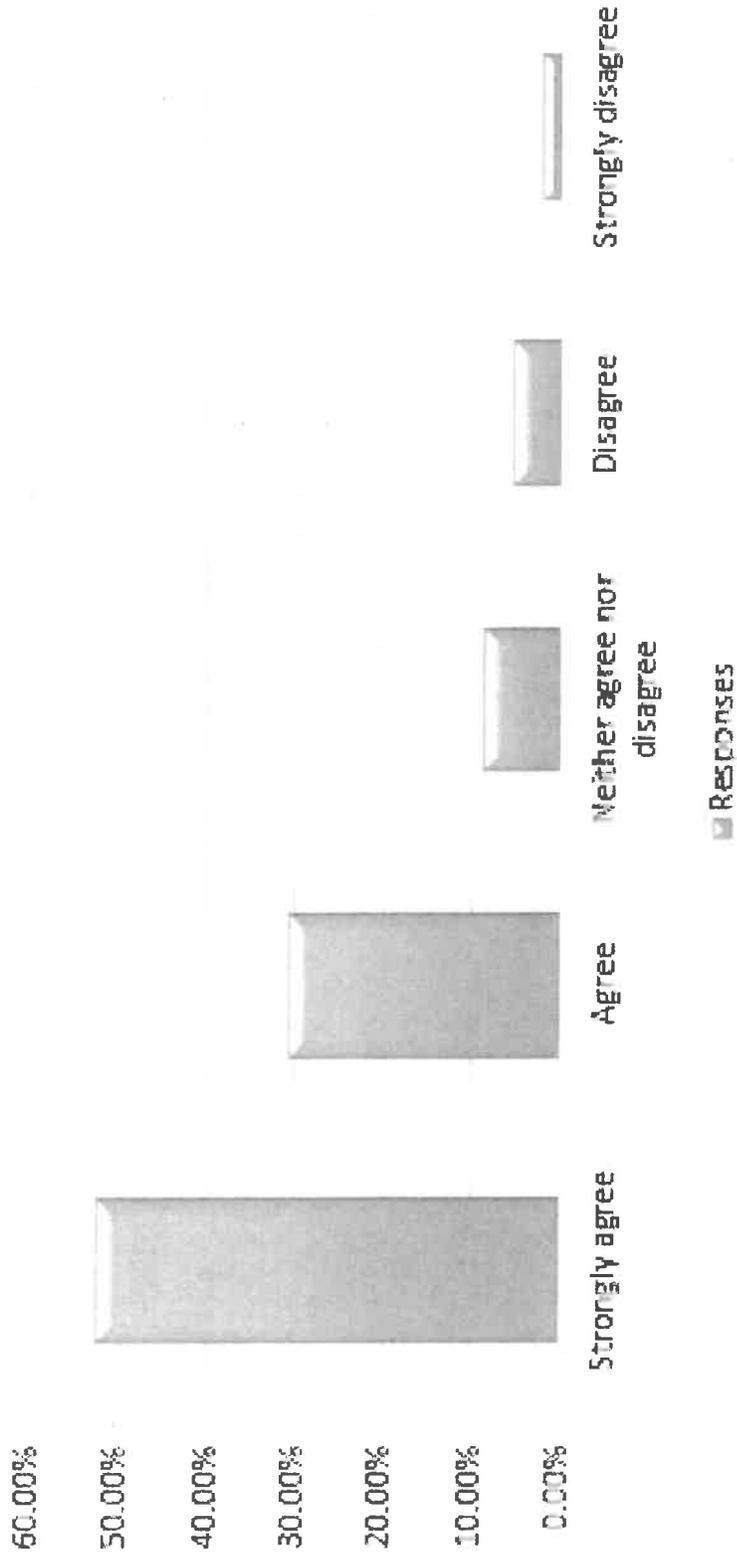
Third most preferred product choices

Dry Leaf Vaporization Tinctures RSO syringes Topicals Concentrates Capsules
 Cartridges/pods



Program Feedback Survey

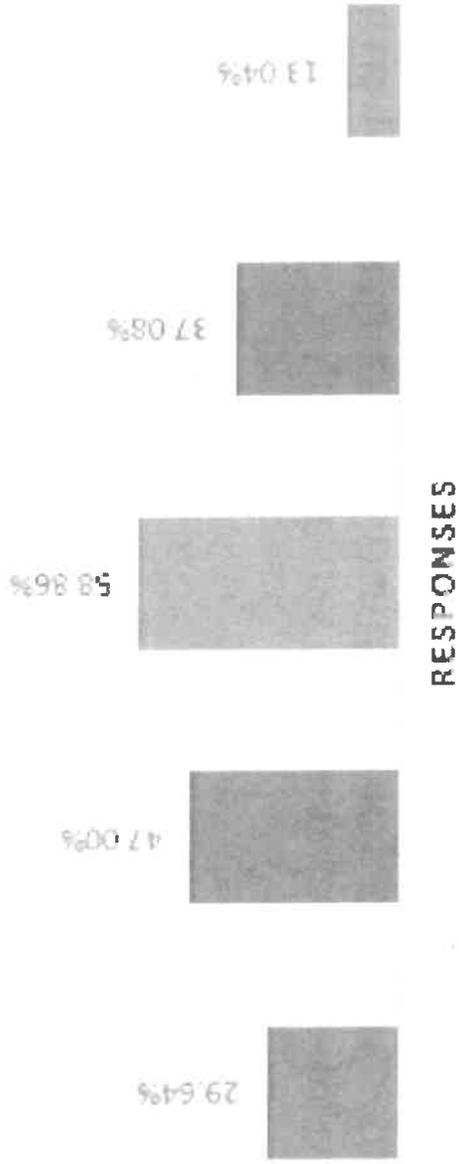
I feel informed about the different forms of medical marijuana and how to use them.



Program Feedback Survey

I would like to have education on:
(Choose all that apply.)

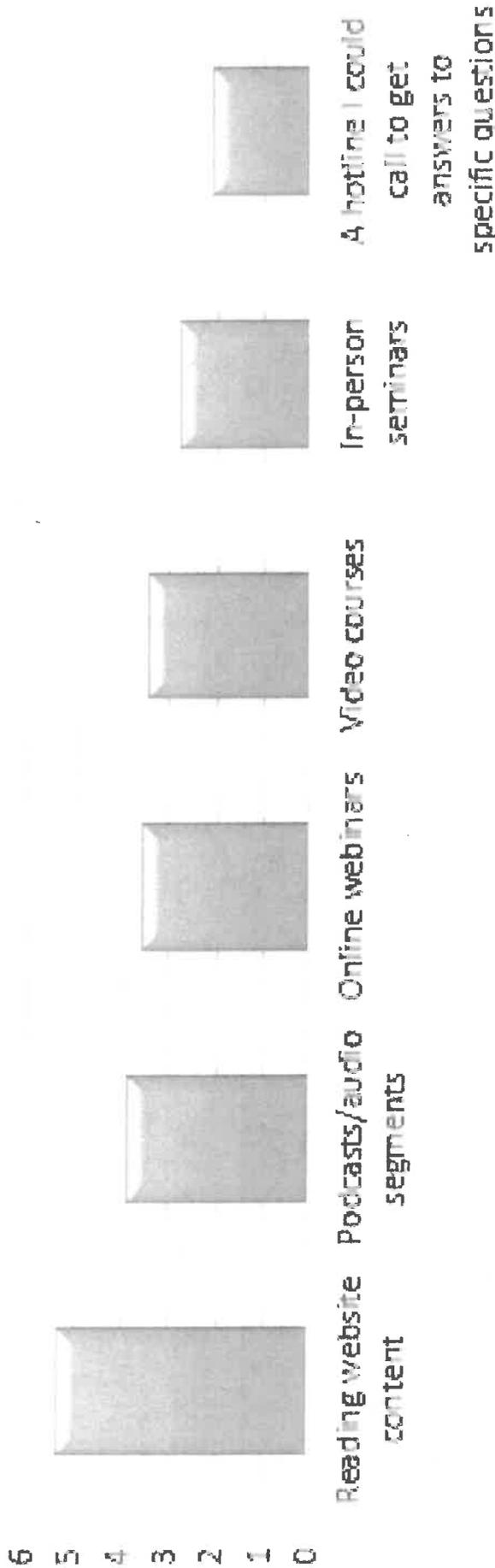
- Product forms
- Differences between strains
- Understanding cannabinoids and terpenes
- Understanding the safety and testing requirements for the MM program
- Other (Please specify.)



RESPONSES

Program Feedback Survey

My preferred method for learning about medical marijuana is:
 (Please rank in order with numbers 1-6, with 1 being your most preferred method.)



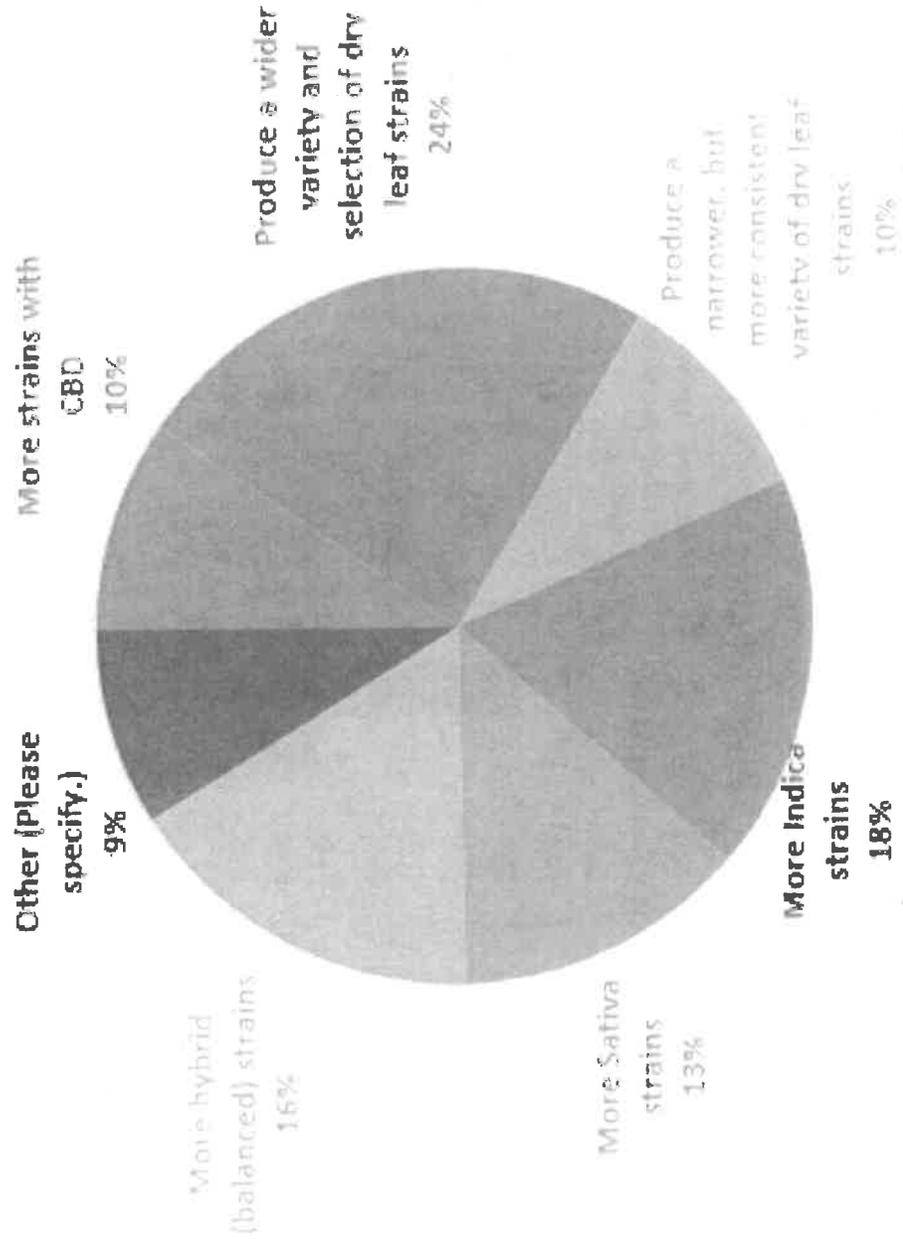
Score

Of the 3,083 respondents who answered this question, 2,076 chose reading website content as their most preferred method of learning about medical marijuana.



Program Feedback Survey

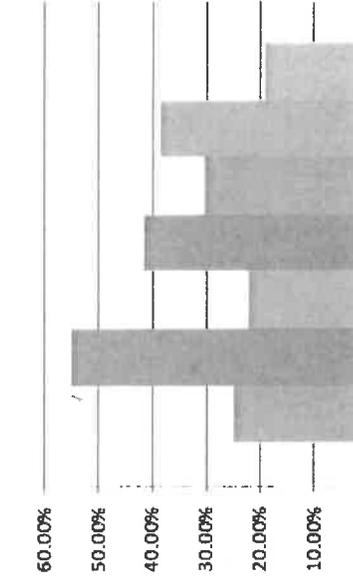
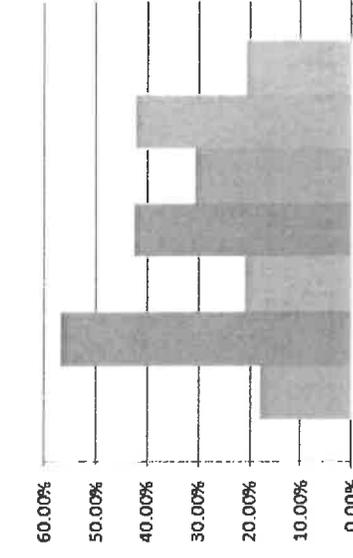
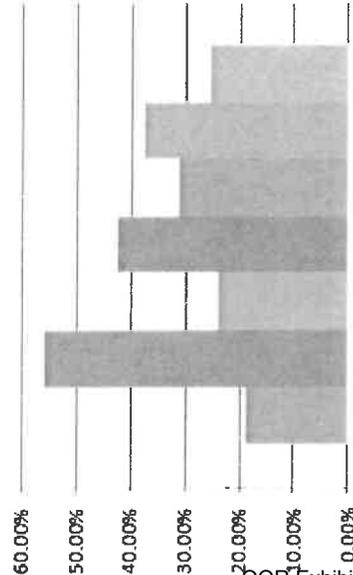
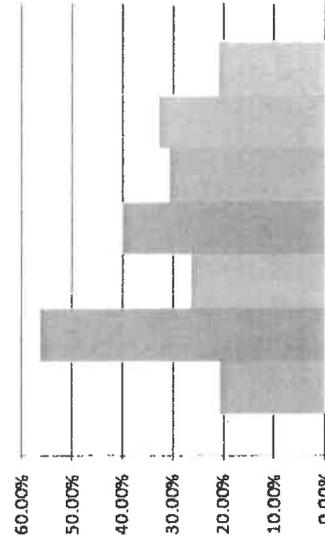
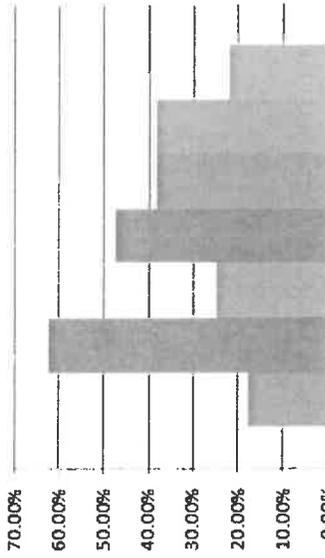
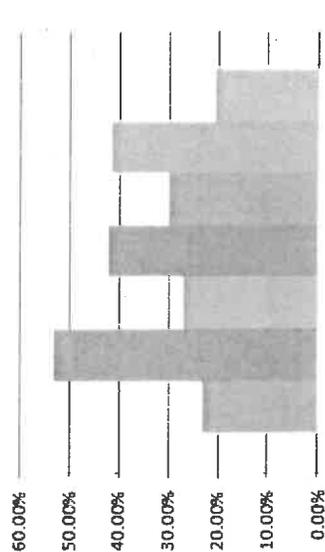
What are your patient needs regarding medical marijuana strains?
(Select all that apply.)



Program Feedback Survey

What are your patient needs regarding medical marijuana strains?
(Select all that apply.)

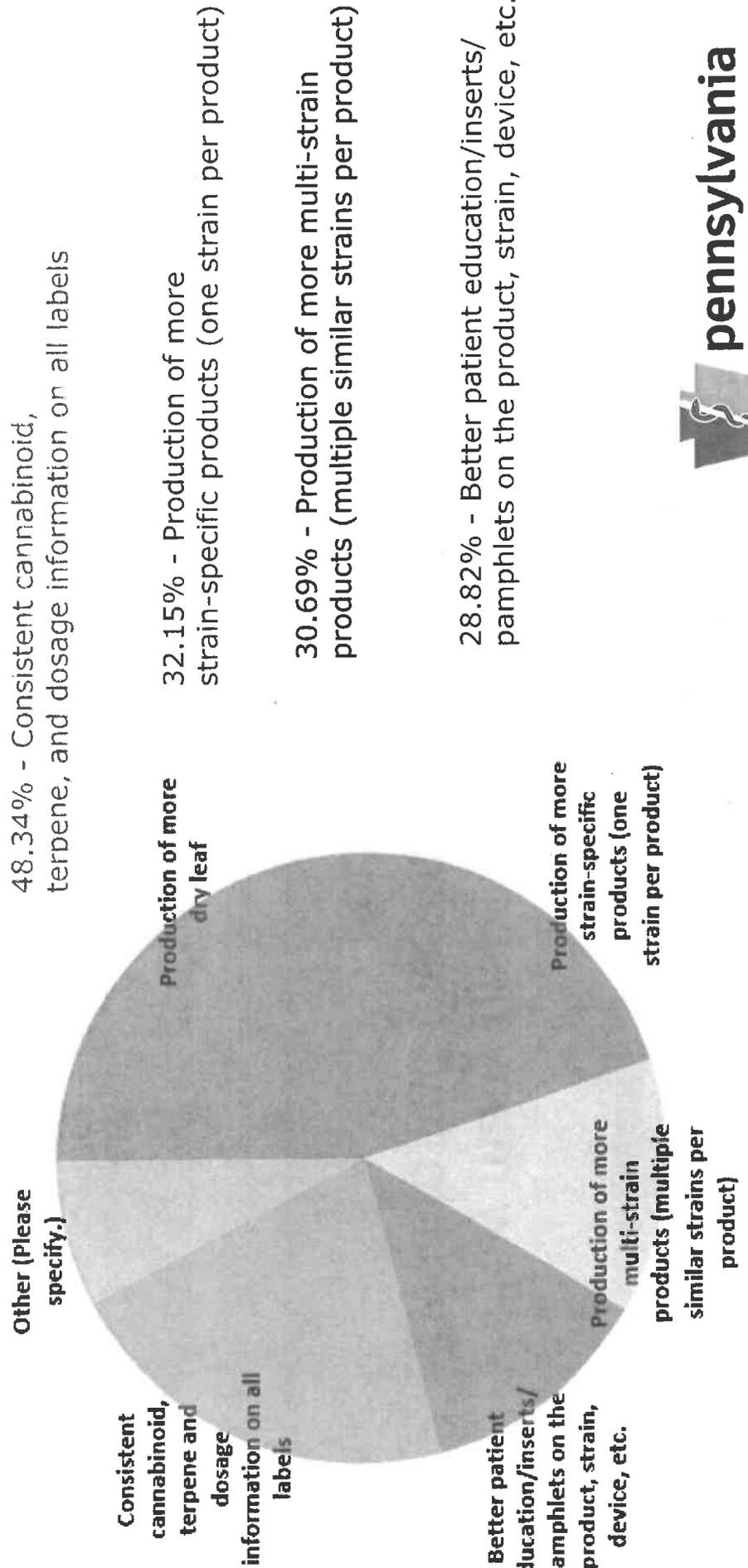
- Produce a wider variety and selection of dry leaf strains
- More strains with CBD
- More Indica strains
- Produce a narrower, but more consistent variety of dry leaf strains
- More hybrid (balanced) strains
- More Sativa strains



Program Feedback Survey

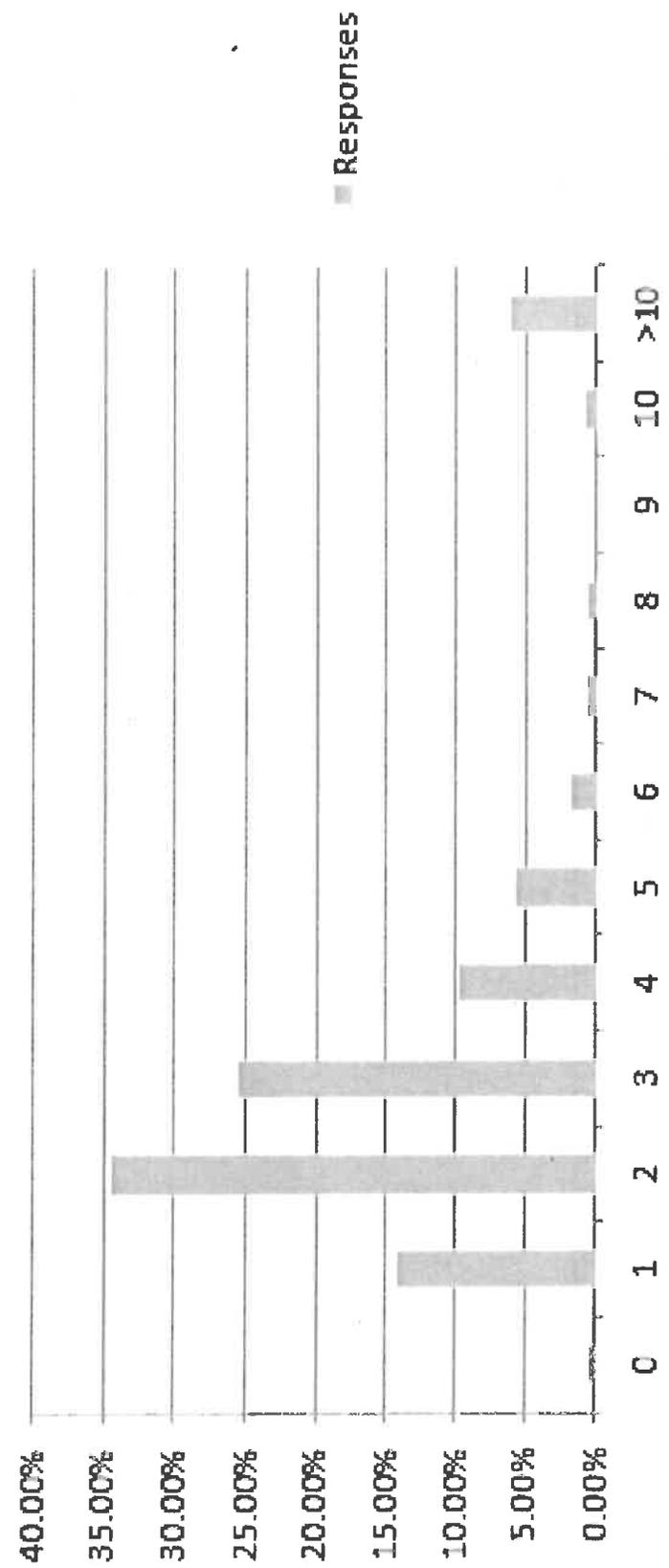
What are your patient needs regarding medical marijuana products?
(Select all that apply.)

69.95% - Selected dry leaf



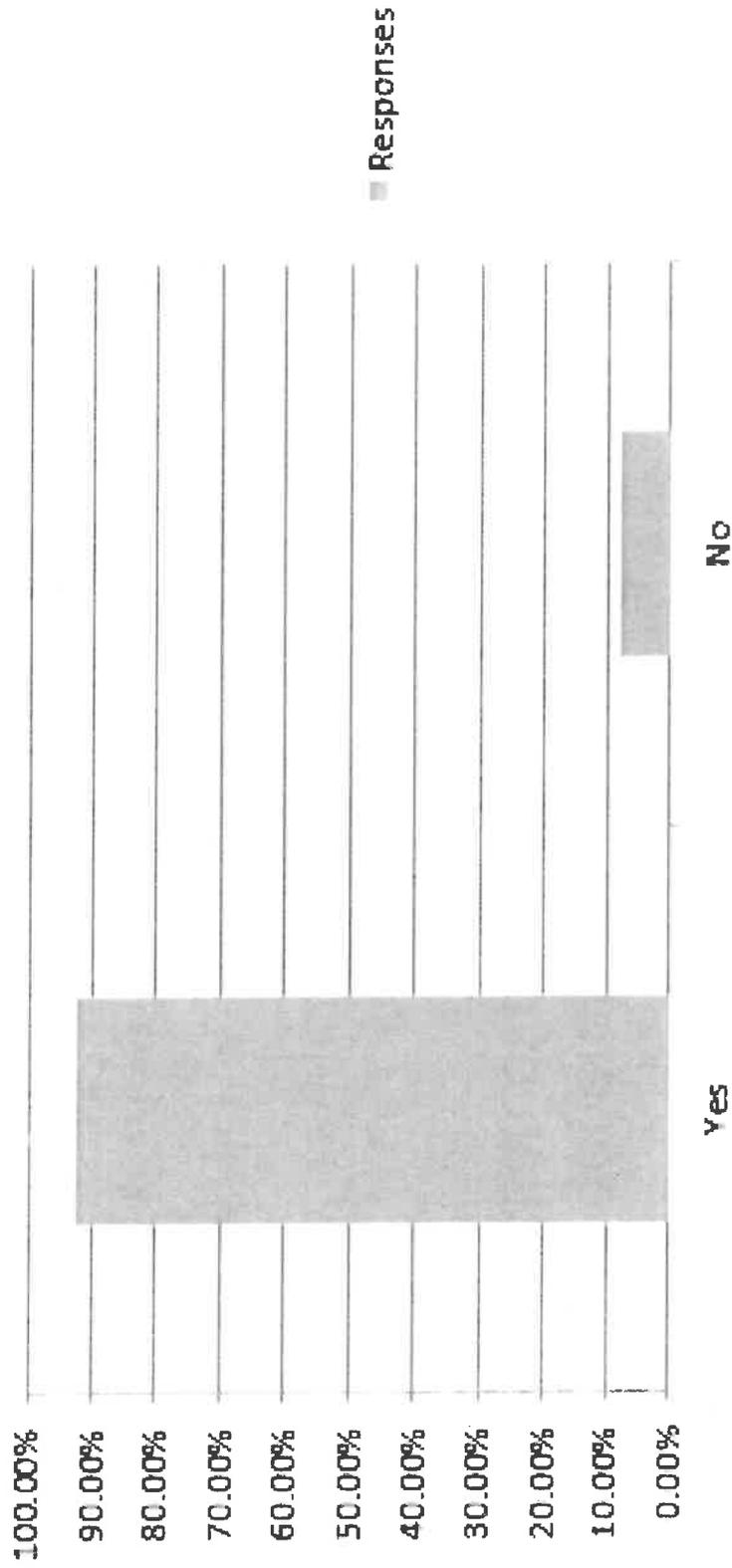
Program Feedback Survey

How many dispensaries are you willing to visit to find the products you need to meet your needs?



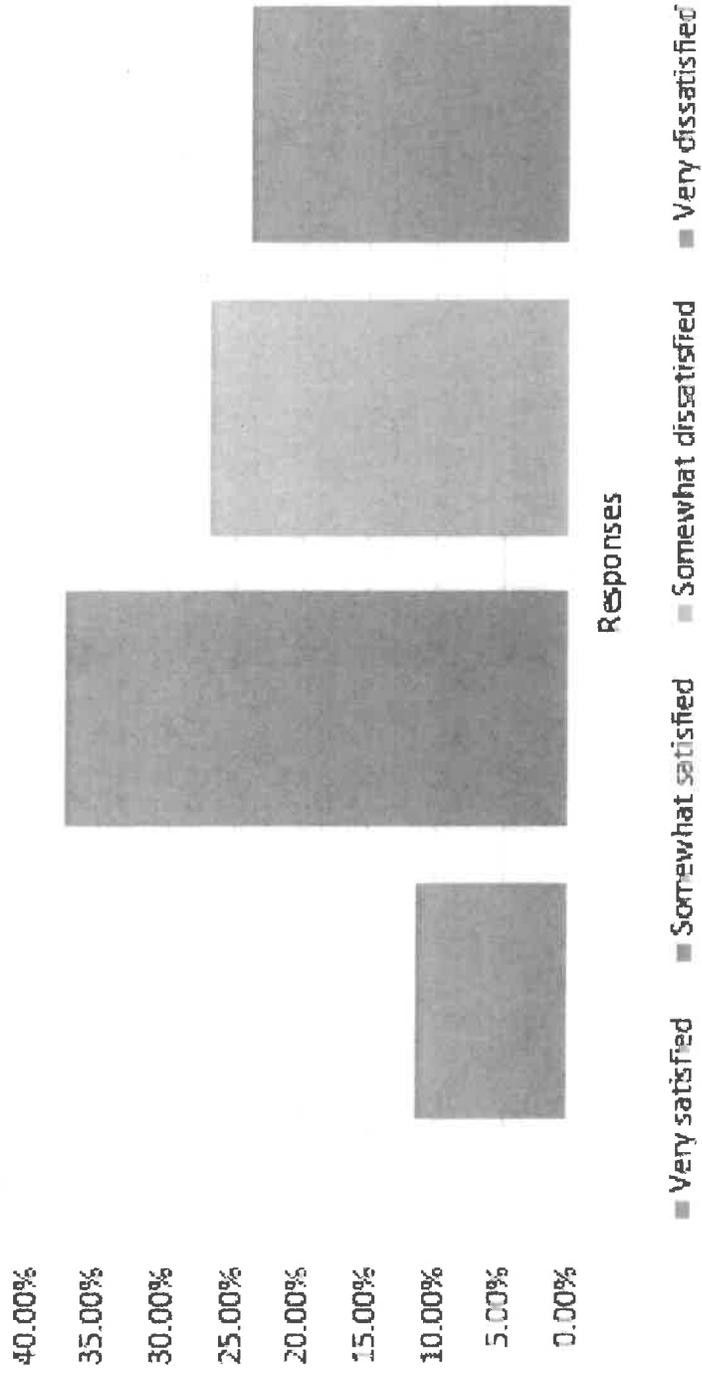
Program Feedback Survey

Do you look at dispensary menus online before you visit?



Program Feedback Survey

In general, are you satisfied with the selection of products at Pa. dispensaries?



Program Feedback Survey

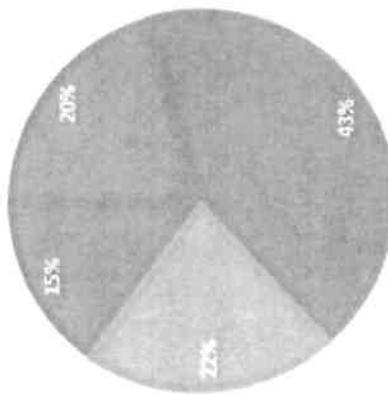
In general, are you satisfied with the selection of products at Pa. dispensaries?

Very satisfied

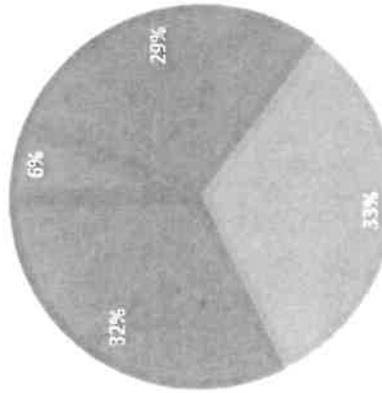
Somewhat dissatisfied

Somewhat satisfied

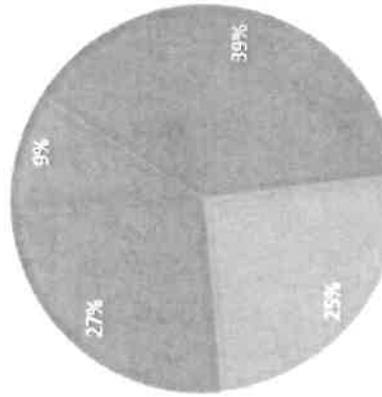
Very dissatisfied



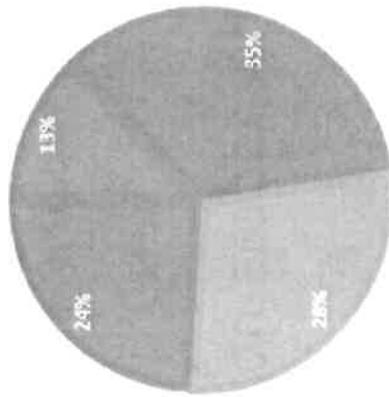
Region 6



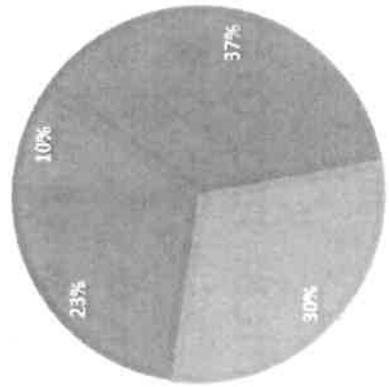
Region 4



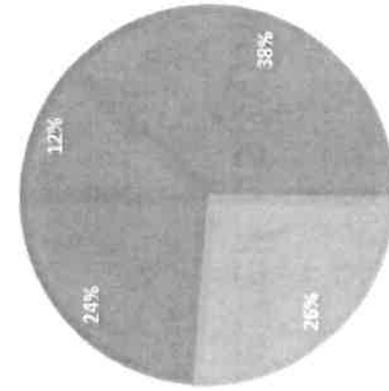
Region 2



Region 5



Region 3



Region 1



Program Feedback Survey

If you stopped using medical marijuana, please tell us why. (Select all that apply)

- 61.11% of respondents said they are unable to afford medical marijuana.
- 44.49% said they have not been able to find a consistent supply of the product(s) they need for their condition.
- 41.85% said they stopped because medical marijuana is not covered by health insurance.
- 21.65% said they were concerned about their legal protections under Act 16.
- Although the regional data was mostly consistent, in the Southwest and Southcentral regions, over 67% of respondents said they are unable to afford medical marijuana.
- While just between 57% and 60% in Southeast, Northwest, Northcentral and Northeast said they are unable to afford medical marijuana.



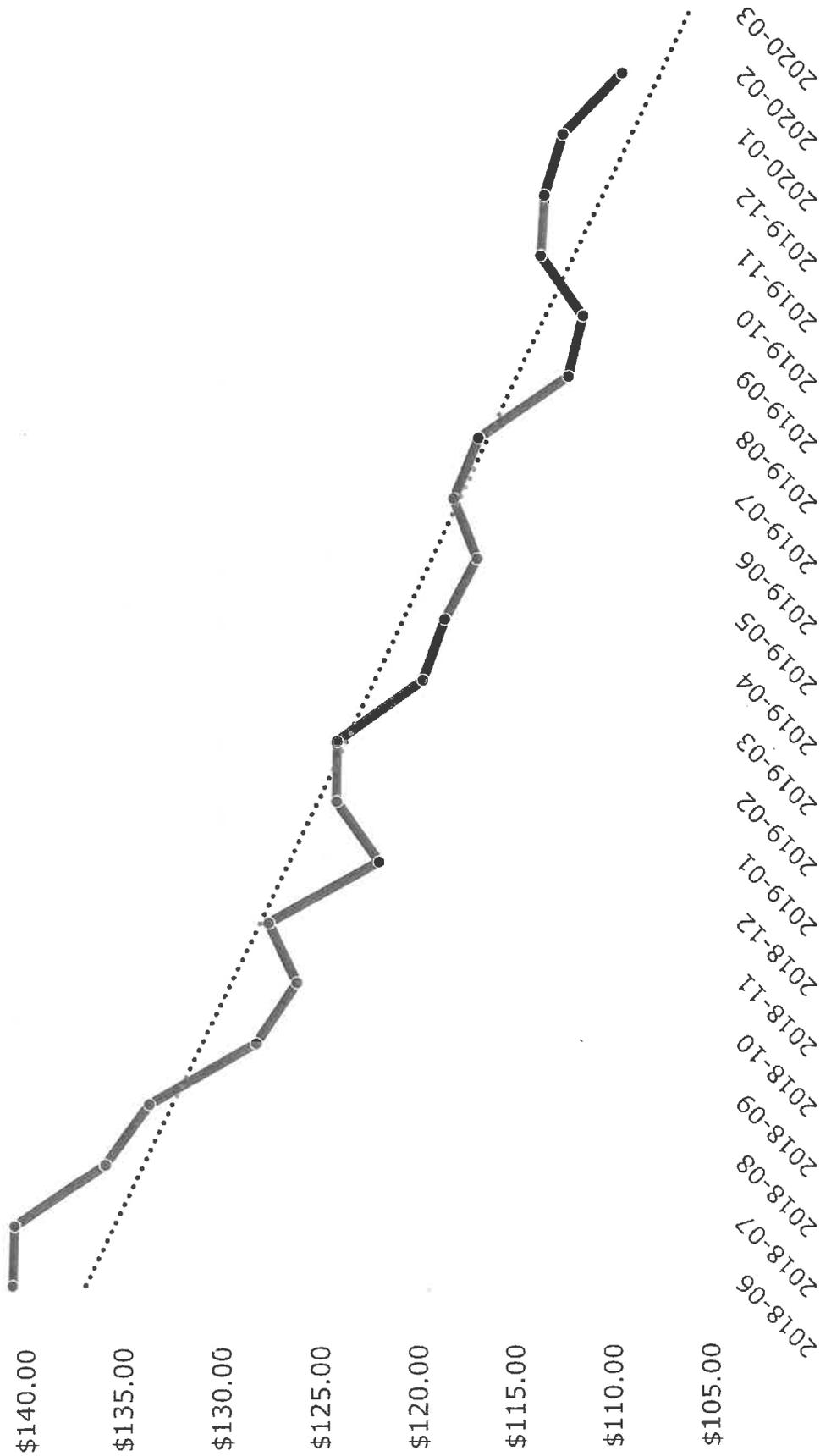
Today's Meeting

- New Business
- Presentation of the DOH Survey
- Vaping Related Illnesses
- Upcoming Research Summit
- Serious Medical Conditions

Medical Marijuana Program Updates

- Patients and caregivers
- Physicians
- Growers/processors and dispensaries
- Chapter 20

Average Order Sales Total



➤ Serious Medical Conditions

Serious Medical Condition	Percent
Severe chronic or intractable pain of neuropathic origin or severe chronic or intractable pain.	45.02%
Anxiety Disorders.	14.94%
Post-traumatic stress disorder.	12.33%
Cancer, including remission therapy.	6.47%
Neuropathies.	6.28%
Opioid use disorder for which conventional therapeutic interventions are contraindicated or ineffective, or for which adjunctive therapy is indicated in combination with primary therapeutic interventions.	3.01%
Damage to the nervous tissue of the central nervous system (brain-spinal cord) with objective neurological indication of intractable spasticity, and other associated neuropathies.	2.12%
Inflammatory bowel disease.	2.00%
Multiple sclerosis.	1.56%
Epilepsy.	1.20%
Crohn's disease.	1.16%
Autism.	< 1%
Glaucoma.	< 1%
Positive status for Human Immunodeficiency Virus or Acquired Immune Deficiency Syndrome.	< 1%
Parkinson's disease.	< 1%
Intractable seizures.	< 1%
Dyskinetic and spastic movement disorders.	< 1%
Neurodegenerative diseases.	< 1%
Amyotrophic lateral sclerosis.	< 1%
Tourette Syndrome.	< 1%
Sickle cell anemia.	< 1%
Terminal illness.	< 1%
Huntington's disease.	< 1%

Medical Marijuana Advisory Board

To watch the Medical Marijuana Advisory Board Meeting taking place on August 17, 2021 from

<https://pacast.com/live/dohmeeting>

(<https://pacast.com/live/dohmeeting>)

10am-noon, please click the following link:  [dohmeeting](#))

Medical Marijuana Two-Year Final Report - May 15, 2020

(</topics/Documents/Programs/Medical%20Marijuana/DOH%20MM%20Official%20Two%20Year%20Report%20-%20May%2015%202020.pdf>)

Qualifying Medical Conditions for Medical Marijuana Usage

(</topics/Documents/Programs/Medical%20Marijuana/DOH%20MM%20Official%20Two%20Year%20Report%20-%20May%2015%202020.pdf>)

(</topics/Documents/Programs/Medical%20Marijuana/DOH%20MM%20Official%20Two%20Year%20Report%20-%20May%2015%202020.pdf>)

(</topics/Documents/Programs/Medical%20Marijuana/DOH%20MM%20Official%20Two%20Year%20Report%20-%20May%2015%202020.pdf>)

Process: Qualifying Medical Conditions for Medical Marijuana Usage Application

(</topics/Documents/Programs/Medical%20Marijuana/PA%20MMAB%20-%20Process%20for%20adding%20changing%20or%20deleting%20serious%20medical%20conditions.pdf>)

(PDF)

Application: Qualifying Medical Conditions for Medical Marijuana Usage Application

(</topics/Documents/Programs/Medical%20Marijuana/PA%20MMAB%20-%20Application%20for%20changing%20adding%20or%20deleting%20serious%20medical%20conditions.pdf>)

(PDF)

Resources for the Medical Marijuana Advisory Board

Serious Medical Condition Applications MMAB Session Aug 17, 2021

(</topics/Documents/Programs/Medical%20Marijuana/Serious%20Medical%20Condition%20Applications%20MMAB%20Session%20Aug%2017,%202021.pdf>)

(PDF)

(</topics/Documents/Programs/Medical%20Marijuana/MMAB%20Presentation%20-%20August%2017,%202021.pdf>)

MMAB Presentation - August 17, 2021

(PDF)

Agenda for Medical Marijuana Advisory Board - August 17, 2021

(</topics/Documents/Programs/Medical%20Marijuana/MMAB%20Meeting%20Agenda%20-%20Aug.%2017,%202021.pdf>)

(PDF)

2021 Medical Marijuana Advisory Board Meeting Schedule

(<http://www.pacodeandbulletin.gov/Display/pabull?file=/secure/pabulletin/data/vol51/51-20/763.html>)

(/topics/Documents/Programs/Medical%20Marijuana/PA%20DOH%20MMAB%20Pr

MMAB Presentation - May 18, 2021

(PDF)

Medical Marijuana Advisory Board Meeting Minutes - November 10, 2020

(/topics/Documents/Programs/Medical%20Marijuana/Meeting%20Minutes%20-%20Nov.%2010,%202020.pdf)

(PDF)

Medical Marijuana Advisory Board Member List (May 17, 2021)

(/topics/Documents/Programs/Medical%20Marijuana/Medical%20Marijuana%20Adv isory%20Board%20Member%20List%20(May%2017,%202021).pdf)

(PDF)

Agenda for Medical Marijuana Advisory Board - May 18, 2021

(/topics/Documents/Programs/Medical%20Marijuana/MMAB%20Agenda%20-%20M ay%2018,%202021.pdf)

(PDF)

Agenda for Medical Marijuana Advisory Board - November 10, 2020

(/topics/Documents/Programs/Medical%20Marijuana/MMAB%20Meeting%20Agen da%20Nov.%2010%202020.pdf)

(PDF)

Medical Marijuana Advisory Board Members - August 2020

(/topics/Documents/Programs/Medical%20Marijuana/Medical%20Marijuana%20Adv isory%20Board%20Member%20List.pdf)

(PDF)

(/topics/Documents/Programs/Medical%20Marijuana/MMAB%20Presentation%20-

MMAB Presentation - August 11, 2020

(PDF)

Agenda for Medical Marijuana Advisory Board - August 11, 2020

(/topics/Documents/Programs/Medical%20Marijuana/MMAB%20Agenda%20-%20A ug.%2011,%202020.pdf)

(PDF)

Medical Marijuana Advisory Board Advisory Meeting - May 12, 2020 - Cancelled

(<https://www.media.pa.gov/Pages/Health-Details.aspx?newsid=798>)

Medical Marijuana Advisory Board Presentation - February 13, 2020

(/topics/Documents/Programs/Medical%20Marijuana/Medical%20Marijuana%20Adv isory%20Board%20Presentation%20Feb.%2013,%202020.pdf)

(PDF)

Agenda for Medical Marijuana Advisory Board - February 13, 2020

(/topics/Documents/Programs/Medical%20Marijuana/MMAB%20Agenda%20-%20F eb.%2013,%202020.pdf)

(PDF)

(/topics/Documents/Programs/Medical%20Marijuana/MMAB%20Agenda%20-%20Nov%2013%202019.pdf)

(PDF)

[2020 Medical Marijuana Advisory Board Meeting Schedule](#) 

(http://www.pacodeandbulletin.gov/Display/pabull?file=/secure/pabulletin/data/vol49/49-44/1647.html)

[Agenda for Medical Marijuana Advisory Board – August 14, 2019](#)

(/topics/Documents/Programs/Medical%20Marijuana/MMAB%20Agenda%20-%20Aug%2014%202019.pdf)

(PDF)

[Agenda for Medical Marijuana Advisory Board – May 15, 2019](#)

(/topics/Documents/Programs/Medical%20Marijuana/MMAB%20Agenda%20-%20May%2015,%202019.pdf)

(PDF)

[Wolf Administration: 100,000 Medical Marijuana Patient Certifications, First Phase II Grower/Processor Now Operational](#)

(https://www.governor.pa.gov/wolf-administration-100000-medical-marijuana-patient-certifications-first-phase-ii-grower-processor-now-operational-2/)

[Agenda for Medical Marijuana Advisory Board – Feb 1, 2019](#)

(/topics/Documents/Programs/Medical%20Marijuana/MMAB%20Agenda%20-%20February%201%202019.pdf)

(PDF)

[Bylaws of the Medical Marijuana Advisory Board](#)

(/topics/Documents/Programs/Medical%20Marijuana/PA%20MMAB%20-%20Bylaws.pdf)

(PDF)

[Medical Marijuana Advisory Board Meeting Schedule](#)

(/topics/Documents/Programs/Medical%20Marijuana/Medical%20Marijuana%20Advisory%20Board%20Meeting%20Schedule.pdf)

(PDF)

[Agenda for Medical Marijuana Advisory Board – Nov 15](#)

(/topics/Documents/Programs/Medical%20Marijuana/MMAB%20Agenda%20-%20Nov%2015%202018.pdf)

(PDF)

(/topics/Documents/Programs/Medical%20Marijuana/Inclement%20Weather%20Notice%20for%20MMAB%20Meeting.pdf)

[Inclement Weather Advisory](#)

(PDF)

[Medical Marijuana Advisory Board PowerPoint Presentation](#)

(/topics/Documents/Programs/Medical%20Marijuana/Presentation%20for%20Advisory%20Board%20Meeting%20Nov%206%20Final.pdf)

(PDF)

[Medical Marijuana Advisory Board Final Report](#)

(/topics/Documents/Programs/Medical%20Marijuana/Final%20Report%20-%20Pennsylvania%20Medical%20Marijuana%20Advisory%20Board%20-%20April%209%202018.pdf)

(Apr 9, 2018, PDF)

[Medical Marijuana Program; Medical Marijuana Advisory Board's report and the Secretary of Health's decision to effectuate the recommendations](#) 

(<https://www.pabulletin.com/secure/data/vol48/48-19/747.html>)

OOB EXHIBIT 8

Isenberg, Kelly

From: Mahon, Ed <emahon@spotlightpa.org>
Sent: Friday, August 6, 2021 10:35 AM
To: Isenberg, Kelly
Cc: Gleeson, Christopher; PADOHRTK; Keefer, Lisa; Skinner, Shea; Hoppes, Danica
Subject: Re: [External] Re: Corrected: Mahon v. DOH: AP 2021-1296
Attachments: RTK_response_aug_6_.pdf

Follow Up Flag: Follow up
Flag Status: Flagged

Hello: Please see my response: RTK_response_aug_6 in AP 2021-1296. I'll be on vacation and unavailable next week. The remaining schedule that we've discussed is as follows:

Mr. Mahon – submits a reply by August 6, 2021.

Mr. Gleeson – submits a response limited to any new issues raised by Mr. Mahon's supplemental submission by Aug. 11, 2021.

The Final Determination will be issued on or before Sept. 2, 2021.

Provided the department's Aug. 11 response is limited to any new issues raised by me, it doesn't appear I will need to respond. Any questions, please call me at 717-421-2518 or email me at emahon@spotlightpa.org.

On Mon, Aug 2, 2021 at 9:34 AM Isenberg, Kelly <kisenberg@pa.gov> wrote:

Mr. Mahon:

Thank you for your quick response and agreement to the briefing schedule. The docket will be amended to reflect the dates outlined in the July 30, 2021, email.

If you have any questions, feel free to contact me.

Regards,

Docket No. AP 2021-1296

Ed Mahon of Spotlight PA (requester) vs. Pennsylvania Department of Health

August 6, 2021

Thank you for the time to review the case, Feldman v. Pa. Comm'n on Crime and Delinquency.

I'm asking the Office of Open Records to please consider the following in making its decision.

1.) Section 709 of the Crime Victims Act:

Section 709. Confidentiality of records.

[The record of a proceeding before the bureau or a hearing examiner shall be a public record; however, a record or report obtained by the bureau or a hearing examiner, the confidentiality of which is protected by any other law or regulation, shall remain confidential subject to that law or regulation.]

(a) General rule.--All reports, records or other information obtained or produced by the bureau during the processing or investigation of a claim shall be confidential and privileged, shall not be subject to subpoena or discovery, shall be used for no purpose other than the processing of a claim and, except as otherwise provided by law or as provided in this section, shall not be introduced into evidence in any judicial or administrative proceeding.

(b) Disclosure restricted.--Except as otherwise provided by law, no person who has had access to a report, record or any other information under this subsection shall disclose the content of such a report, record or other information or testify in a judicial or administrative proceeding without the written consent of the direct victim or intervenor or, if the direct victim or intervenor is deceased, the claimant.

(c) Construction.--This section shall not be construed to preclude or limit introduction of the contents of a report, record or other information in an appeal hearing before the Office of Victims' Services or in an investigation, prosecution or judicial proceeding enforcing section 1303 or in communicating with the prosecutor's office regarding restitution.

The restrictions in Section 709 of the Pennsylvania Crime Victims Act are more specific and provide, arguably, greater protection from disclosure. Section 709, for example, states that the information isn't subject to disclosure through the "subpoena or discovery" process. Whether the correct interpretation is that Section 709 prohibits aggregate data from being released is a different issue. But my point is Section 709 is more prohibitive than Act 16 of 2016.

2.) Also, regarding the Feldman case, I'll again draw your attention to the recent Office of Open Records ruling in *Finnerty vs. the Pennsylvania Department of Health* (Docket No. AP 2021-1061.) In that ruling, the office provided a thorough analysis of the confidentiality provisions of Act 16 of 2016 on pages 5 and 6.

The Department is correct that the requested information is not included in subsection (b), as set forth above. However, subsection (b) is not an exhaustive list of public records under the Medical Marijuana Act. If the General Assembly intended the list to be exhaustive, it could have done so, by noting that only three categories of records regarding the medical marijuana program may be disclosed. Without such language, subsection (b) appears to be strictly illustrative, in that the General Assembly intended to highlight specific records that may be disclosed. Any records not confidential under subsection (a), and not otherwise discussed under subsection (b), are still presumed to be public records, and subject to the RTKL. See 65 P.S. § 67.305(a).

The overarching question before the OOR is whether the requested information – aggregate data consisting of the number of patients broken down by county – is "information ... relating to patients, caregivers, and other applicants...." 35 P.S. § 10231.302(a). It is difficult to believe that the General Assembly intended the release of aggregate data concerning the medical marijuana program to be a crime, and the context of Section 302 does not support the Department's broad interpretation. Subsection (a) begins with discussing "a confidential list of patients and caregivers," and concludes by providing a non-exhaustive list of examples of records that are subject to confidentiality, all of which concern the identification of specific patients and caregivers. The heading of subsection (a) is "Patient information."² Based upon this context, the OOR can only conclude that subsection (a) concerns information and records relating to specific patients and caregivers, rather than information in the aggregate about the program.³ Thus, this is the reason why Section 1307 of the Medical Marijuana Act criminalizes the disclosure of "any information related to the use of medical marijuana" (emphasis added) – the General Assembly was concerned about the disclosure of information regarding patients and caregivers, rather than all information concerning the program.

The office made the point well in its decision. And I'll echo the argument that Section 1307 of the Medical Marijuana Act contains non-exhaustive lists of examples. Section 709 of Feldman doesn't contain similar non-exhaustive lists.

OOB EXHIBIT 9

Isenberg, Kelly

From: Gleeson, Christopher
Sent: Monday, August 23, 2021 8:18 AM
To: Isenberg, Kelly; Mahon, Ed
Cc: PADOHRTK; Keefer, Lisa; Skinner, Shea; Hoppes, Danica
Subject: RE: [External] Re: Corrected: Mahon v. DOH: AP 2021-1296

Good morning Attorney Isenberg and Mr. Mahon,

I just wanted to confirm that the Department did not submit any supplemental response in this case.

Thank you!

Chris

Christopher J. Gleeson | Assistant Counsel
Pennsylvania Department of Health
Office of Legal Counsel
Room 825 | Health and Welfare Building
625 Forster Street | Harrisburg, PA 17120
Ph: 717-783-2500 | Fax: 717-705-6042
www.health.pa.gov

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From: Isenberg, Kelly <kisenberg@pa.gov>
Sent: Friday, August 20, 2021 4:41 PM
To: Mahon, Ed <emahon@spotlightpa.org>
Cc: Gleeson, Christopher <cgleeson@pa.gov>; PADOHRTK <PADOHRTK@pa.gov>; Keefer, Lisa <likeefer@pa.gov>; Skinner, Shea <sheskinner@pa.gov>; Hoppes, Danica <dahoppes@pa.gov>
Subject: RE: [External] Re: Corrected: Mahon v. DOH: AP 2021-1296

Mr. Mahon:

I do not have a record of a supplemental submission from the Department.

Kelly Isenberg



Kelly C. Isenberg | Attorney
Senior Appeals Officer
Office of Open Records

333 Market Street, 16th Floor
Harrisburg, PA 17101-2234
Phone: (717) 346-9903
Fax: (717) 425-5343
<https://www.openrecords.pa.gov>
@OpenRecordsPA

From: Mahon, Ed <emahon@spotlightpa.org>

Sent: Friday, August 20, 2021 3:57 PM

To: Isenberg, Kelly <kisenberg@pa.gov>

Cc: Gleeson, Christopher <cgleeson@pa.gov>; PADOHRTK <PADOHRTK@pa.gov>; Keefer, Lisa <likeefer@pa.gov>; Skinner, Shea <sheskinner@pa.gov>; Hoppes, Danica <dahoppes@pa.gov>

Subject: Re: [External] Re: Corrected: Mahon v. DOH: AP 2021-1296

Hi: I was on vacation, and just wanted to confirm that I didn't miss a response by the department that could have been submitted by Aug. 11. Thank you!

On Fri, Aug 6, 2021 at 10:35 AM Mahon, Ed <emahon@spotlightpa.org> wrote:

Hello: Please see my response: RTK_response_aug_6 in AP 2021-1296. I'll be on vacation and unavailable next week. The remaining schedule that we've discussed is as follows:

Mr. Mahon – submits a reply by August 6, 2021.

Mr. Gleeson – submits a response limited to any new issues raised by Mr. Mahon's supplemental submission by Aug. 11, 2021.

The Final Determination will be issued on or before Sept. 2, 2021.

Provided the department's Aug. 11 response is limited to any new issues raised by me, it doesn't appear I will need to respond. Any questions, please call me at 717-421-2518 or email me at emahon@spotlightpa.org.

On Mon, Aug 2, 2021 at 9:34 AM Isenberg, Kelly <kisenberg@pa.gov> wrote:

Mr. Mahon:

Thank you for your quick response and agreement to the briefing schedule. The docket will be amended to reflect the dates outlined in the July 30, 2021, email.

If you have any questions, feel free to contact me.

Regards,

Kelly Isenberg



Kelly C. Isenberg | Attorney

Senior Appeals Officer

Office of Open Records

333 Market Street, 16th Floor

Harrisburg, PA 17101-2234

Phone: (717) 346-9903

Fax: (717) 425-5343

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@OpenRecordsPA

From: Mahon, Ed <emahon@spotlightpa.org>

Sent: Friday, July 30, 2021 9:34 PM

To: Isenberg, Kelly <kisenberg@pa.gov>

Cc: Gleeson, Christopher <cgleeson@pa.gov>; PADOHRTK <PADOHRTK@pa.gov>; Keefer, Lisa <likeefer@pa.gov>; Skinner, Shea <sheskinner@pa.gov>; Hoppes, Danica <dahoppes@pa.gov>

Subject: Re: [External] Re: Corrected: Mahon v. DOH: AP 2021-1296

OOR EXHIBIT 10



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:
	:
ED MAHON AND SPOTLIGHT PA,	:
Requester	:
	:
v.	: Docket No: AP 2021-1296
	:
PENNSYLVANIA DEPARTMENT OF	:
HEALTH,	:
Respondent	:

INTRODUCTION

Ed Mahon, on behalf of Spotlight PA, (collectively “Requester”) submitted a request (“Request”) to the Pennsylvania Department of Health (“Department”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking data and policies related to medical marijuana certifications. The Department denied the Request, arguing that the requested information is confidential under the Medical Marijuana Act and certain records do not exist. The Requester appealed to the Office of Open Records (“OOR”). For the reasons set forth in this Final Determination, the appeal is **granted**, and the Department is required to take additional action as directed.

FACTUAL BACKGROUND

On June 15, 2021, the Request was filed, seeking:

1. Aggregate data for the number of medical marijuana certification issues for each of the eligible qualifying conditions. As of June 15, 2021, the Department of Health describes the following:

Only patients suffering from one of the following medical conditions can participate in Pennsylvania's medical marijuana program:

- Amyotrophic lateral sclerosis.
- Anxiety disorder.
- Autism.
- Cancer, including remission therapy.
- Crohn's disease.
- Damage to the nervous tissue of the central nervous system (brain-spinal cord) with objective neurological indication of intractable spasticity and other associated neuropathies.
- Dyskinetic and spastic movement disorders.
- Epilepsy.
- Glaucoma.
- HIV/AIDS.
- Huntington's disease.
- Inflammatory bowel disease.
- Intractable seizures.
- Multiple sclerosis.
- Neurodegenerative diseases.
- Neuropathies.
- Opioid use disorder for which conventional therapeutic interventions are contraindicated or ineffective, or for which adjunctive therapy is indicated in combination with primary therapeutic interventions.
- Parkinson's disease.
- Post-traumatic stress disorder.
- Severe chronic or intractable pain of neuropathic origin or severe chronic or intractable pain.
- Sickle cell anemia.
- Terminal illness.
- Tourette syndrome.

2. Any written policies or procedures describing how the Department of Health tracks the use of its medical marijuana program, including which qualifying conditions are certified. The Department of Health press office in a June 11 email indicated that it does track some of this information.

On June 23, 2021, the Department denied the Request, arguing that the records responsive to Item 1 are confidential under the Medical Marijuana Act (“Act”), 35 P.S. § 10231.302(a), and records do not exist that are responsive to Item 2.

On July 1, 2021, the Requester appealed to the OOR, challenging the denial and stating grounds for disclosure. The OOR invited both parties to supplement the record and directed the Department to notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c).

On July 21, 2021, the Requester submitted a statement in support of the appeal, along with and other information, including a news article, meeting minutes and an email from the Department.

On July 30, 2021, the Department submitted a position statement reiterating its grounds for denial.¹ Relying on *Feldman v. Pa. Comm’n on Crime and Delinquency*, 208 A.3d 167 (Pa. Commw. Ct. 2019), the Department also argues that the Act’s confidentiality provisions apply to aggregated data. In support of its position, the Department submitted the attestation made under penalty of perjury from Lisa Keefer, the Department’s Open Records Officer.

Also, on July 30, 2021, the Requester submitted two statements in support of the appeal and included several exhibits comprised of news articles, meeting minutes and presentations from the Department’s Medical Marijuana Advisory Board (“MMAB”), and an email from a

¹ On July 21, 2021, the OOR granted the Requester’s request to extend the record closing date until July 30, 2021. In addition, the Requester agreed to extend the Final Determination issuance date until September 2, 2021. Subsequently, the OOR granted the Requester’s request to submit a reply to the Department’s submission by setting a briefing schedule establishing deadlines for the Requester’s response submission and the opportunity for the Department to reply to any new issues raised in the submission. See 65 P.S. § 67.1101(b)(1); 65 P.S. § 67.1102(b)(3) (stating that “the appeals officer shall rule on procedural matters on the basis of justice, fairness, and the expeditious resolution of the dispute”).

Department employee that he argues underscore the fact that the Department regularly releases the type of information sought in Item 1. The Requester also submitted the recent OOR Final Determination issued in *John Finnerty and CNHI v. Pennsylvania Dep't of Health*, OOR Dkt. AP 2021-1061, 2021 PA O.O.R.D. LEXIS _____. The Requester further argues that the various documents containing statistical information related to the Act and the Medical Marijuana Program suggest that the policies and procedures sought in Item 2 should exist. In addition, the Requester submitted an attestation made under penalty of perjury attesting to the accuracy and correctness of the attachments provided with the submission.

On August 6, 2021, the Requester submitted a response to the Department's submission, arguing that the case of *Feldman* does not support the Department's argument that even aggregate data is confidential under the Act. The Department did not submit a reply to the Requester's supplemental response.

LEGAL ANALYSIS

"The objective of the Right to Know Law ... is to empower citizens by affording them access to information concerning the activities of their government." *SWB Yankees L.L.C. v. Wintermantel*, 45 A.3d 1029, 1041 (Pa. 2012). Further, this important open-government law is "designed to promote access to official government information in order to prohibit secrets, scrutinize the actions of public officials and make public officials accountable for their actions." *Bowling v. Office of Open Records*, 990 A.2d 813, 824 (Pa. Commw. Ct. 2010), *aff'd* 75 A.3d 453 (Pa. 2013).

The OOR is authorized to hear appeals for all Commonwealth and local agencies. *See* 65 P.S. § 67.503(a). An appeals officer is required "to review all information filed relating to the request" and may consider testimony, evidence and documents that are reasonably probative and

relevant to the matter at issue. 65 P.S. § 67.1102(a)(2). An appeals officer may conduct a hearing to resolve an appeal. The decision to hold a hearing is discretionary and non-appealable. *Id.* Here, neither party requested a hearing.

The Department is a Commonwealth agency subject to the RTKL that is required to disclose public records. 65 P.S. § 67.301. Records in possession of a Commonwealth agency are presumed public unless exempt under the RTKL or other law or protected by a privilege, judicial order or decree. *See* 65 P.S. § 67.305. Upon receipt of a request, an agency is required to assess whether a record requested is within its possession, custody or control and respond within five business days. 65 P.S. § 67.901. An agency bears the burden of proving the applicability of any cited exemptions. *See* 65 P.S. § 67.708(b).

Section 708 of the RTKL places the burden of proof on the public body to demonstrate that a record is exempt. In pertinent part, Section 708(a) states: “(1) The burden of proving that a record of a Commonwealth agency or local agency is exempt from public access shall be on the Commonwealth agency or local agency receiving a request by a preponderance of the evidence.” 65 P.S. § 67.708(a)(1). Preponderance of the evidence has been defined as “such proof as leads the fact-finder ... to find that the existence of a contested fact is more probable than its nonexistence.” *Pa. State Troopers Ass’n v. Scolforo*, 18 A.3d 435, 439 (Pa. Commw. Ct. 2011) (quoting *Pa. Dep’t of Transp. v. Agric. Lands Condemnation Approval Bd.*, 5 A.3d 821, 827 (Pa. Commw. Ct. 2010)). Likewise, “[t]he burden of proving a record does not exist ... is placed on the agency responding to the right-to-know request.” *Hodges v. Pa. Dep’t of Health*, 29 A.3d 1190, 1192 (Pa. Commw. Ct. 2011).

1. The requested aggregate data is not confidential under Section 302 of the Act

The Department argues that the information requested in Item 1 is confidential under Section 302 of the Medical Marijuana Act, titled “Confidentiality and public disclosure,” which provides:

(a) Patient information. – The [D]epartment shall maintain a confidential list of patients and caregivers to whom it has issued identification cards. All information obtained by the [D]epartment relating to patients, caregivers and other applicants shall be confidential and not subject to public disclosure, including disclosure under the ... [RTKL], including:

- (1) Individual identifying information about patients and caregivers.
- (2) Certifications issued by practitioners.
- (3) Information on identification cards.
- (4) Information provided by the Pennsylvania State Police under section 502(b).
- (5) Information relating to the patient’s serious medical condition.

(b) Public information. – The following records are public records and shall be subject to the [RTKL]:

- (1) Applications for permits submitted by medical marijuana organizations.
- (2) The names, business addresses and medical credentials of practitioners authorized to provide certifications to patients to enable them to obtain and use medical marijuana in this Commonwealth. All other practitioner registration information shall be confidential and exempt from public disclosure under the [RTKL].
- (3) Information relating to penalties or other disciplinary actions taken against a medical marijuana organization or practitioner by the [D]epartment for violation of this act.

35 P.S. § 10231.302. The Department reasons that because the information constitutes “information obtained by the [D]epartment relating to patients” under subsection (a) and because it is not included in subsection (b)’s list of public information, it is confidential. In addition, the Department notes that the information sought is “information relating to the patient’s serious

medical condition,” which is an example of a category of information the Act identifies as confidential. *See* 35 P.S. § 10231.302(a)(5). Further, the Department notes that disclosure of “any information related to the use of medical marijuana” by Department employees is a misdemeanor of the third degree under the Medical Marijuana Act. 35 P.S. § 10231.1307(a).

As noted by the Requester, in *Finnerty*, the OOR recently considered the application of the confidentiality provisions of the Act found in section 302, to a request seeking aggregate data. In *Finnerty*, the request sought “records detailing the number of medical marijuana patients in each county.” The Department denied the request, arguing that the information is confidential under the Medical Marijuana Act, 35 P.S. § 1023.302(a). By conducting an examination of the text of the confidentiality provisions and the underlying legislative intent, the OOR determined that when applying Section 302 of the Act to determine the confidentiality of a record, “[a]ny records not confidential under subsection (a), and not otherwise discussed under subsection (b), are still presumed to be public records, and subject to the RTKL. *See* 65 P.S. § 67.305(a).” *Finnerty*, OOR Dkt. AP 2021-1061, p.5. The OOR then applied this reasoning to conclude the following:

The overarching question before the OOR is whether the requested information – aggregate data consisting of the number of patients broken down by county – is “information ... relating to patients, caregivers, and other applicants...” 35 P.S. § 10231.302(a). It is difficult to believe that the General Assembly intended the release of aggregate data concerning the medical marijuana program to be a crime, and the context of Section 302 does not support the Department’s broad interpretation. Subsection (a) begins with discussing “a confidential list of patients and caregivers,” and concludes by providing a non-exhaustive list of examples of records that are subject to confidentiality, all of which concern the identification of specific patients and caregivers. The heading of subsection (a) is “Patient information.”² Based upon this context, the OOR can only conclude that subsection (a) concerns information and records relating to specific patients and caregivers, rather than information in the aggregate about the program.³

² Headings “shall not be considered to control but may be used to aid in the construction thereof.” 1 Pa.C.S. § 1924.

³ Although no longer in effect, the Department’s temporary regulations that it previously enacted concerning the Medical Marijuana Act support this conclusion. Those temporary regulations, while expanding upon the examples of confidential records set forth in 35 P.S. § 10231.302(a), concern information regarding specific patients, caregivers, and applicants and did not cover any information in the aggregate. 28 Pa. Code § 1141.22 (expired May 12, 2020).

Finnerty, AP 2021-1061, pp. 5-6 (footnotes in original).

Turning to the instant matter, in Item 1, the Requester expressly seeks aggregate data namely, “*aggregate data for the number of medical marijuana certification issue[d]*” for the list of qualifying conditions found in the Act. The Department asserts that the requested data “falls plainly within the universe of “all information obtained by the department relating to patients, caregivers and other applicants” and is the type of “information relating to the patient’s serious medical condition.” However, as in *Finnerty*, Item 1 expressly seeks data of the medical marijuana certifications by category, not information that would be related to a specific patient, caregiver or applicant certification.

Nevertheless, relying on *Feldman*, the Department asserts that even aggregate data would be confidential under Section 302 of the Act, asking the OOR to compare the language of the respective confidentiality provisions. In *Feldman*, the Court concluded that, despite the fact that the Commission had already disclosed certain pieces of aggregated demographic data, all of the requested information was precluded from disclosure under 709 of the Crime Victims Act (“CVA”). Section 709 of CVA, 18 P.S. § 11.709(a)-(b), provides, in pertinent part:

(a) General rule.--All reports, records or other information obtained or produced by the bureau during the processing or investigation of a claim shall be confidential and privileged....

In *Feldman*, the Commonwealth Court concluded that, because section 709 of the CVA makes clear that **all reports, records or information obtained or produced during the processing or investigation of a claim shall be confidential and privileged**, the information requested is not a public record under the RTKL. 208 A.3d at 175 (emphasis in original). The Court reasoned that, “while most of the RTKL exceptions of 708(b) do not apply when data is aggregated, section 708(b) of the RTKL is inapplicable to records that are exempt from disclosure under another state

law” and because the requested demographic data is exempt from disclosure pursuant to a different state law, *i.e.*, section 709 of the Crime Victims Act” the information is not a public record and the aggregated data should not have been disclosed. *Id.*

However, a comparison of the language set forth in Section 709 of the CVA with the confidentiality language of Section 302 at issue here shows that the CVA is more encompassing in regards to what information must be kept confidential. In Section 709 of the CVA the legislature made clear that *all* reports, records or information obtained or produced for a crime victim’s claims investigation are protected from disclosure. Here, as discussed above, the information protected as confidential under Section 302, is that which “*relat[es] to patients, caregivers and other applicants,*” as compared to *all* information, as indicated in the CVA. The Department has not presented evidence to demonstrate how the requested numbers may be connected to an identifiable patient, caregiver or other applicant. Furthermore, the definitions of “patient” and “caregiver” in Section 102 of the Act both are defined in terms of “individuals,” leading to the reasonable inference that the confidentiality provisions in Section 302 were intended to apply to information relating to “individuals” not aggregated categorical data.⁴ Because of the distinctions in the confidentiality language provisions, the ruling in *Feldman*, is distinguishable and, therefore, not applicable to this matter. As determined in *Finnerty*, based upon the context set forth in Section 302 of the Act, the requested aggregated data sought in Item 1, is subject to public access.

2. The Department has failed to prove that records responsive to Item 2 do not exist

The Department argues that, based upon a search of records, the policies and procedures sought in Item 2 do not exist within its possession, custody or control. In support of the

⁴ We note that the RTKL defines aggregated data as, “[a] tabulation of data which relate to broad classes, groups or categories so that it is not possible to distinguish the properties of individuals within those classes, groups or categories.” *See* 65 P.S. § 67.102.

Department's position, Ms. Keefer attests that she is responsible for responding to RTKL request for the Department and is familiar with the Department's records. Ms. Keefer also attests that, upon receipt of the Request, she "performed a comprehensive search for responsive records in the Department's possession." Ms. Keefer further attests, the following:

As a result of that search, I have been advised that the records sought by [Item] 2 of the underlying [R]equest do not exist, as there are no 'written policies or procedures describing how the Department ... tracks the use of its medical marijuana program ...[.]'

The ... search of the Department's records reveals that the records requested do not exist and are therefore not within the Department's possession, custody or control.

Under the RTKL, a statement made under made under the penalty of perjury may serve as sufficient evidentiary support to sustain an agency's burden of proof. *See Sherry v. Radnor Twp.* Sch. Dist., 20 A.3d 515, 520-21 (Pa. Commw. Ct. 2011); *Moore v. Office of Open Records*, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010).

The Requester has submitted examples of news articles, press releases and presentations of the Department's MMAB, which was established pursuant to Section 1201 of the Act, that contain various statistics related to the administration of the Medical Marijuana program. The Requester also submitted a link to the Department's website for an MMAB presentation that reported on survey responses gathered as part of the MMAB's duties to "accept and review comments from individuals and organization[s] about medical marijuana" and the report includes statistical information from the analysis of the data gleaned from the survey, including a statistical breakdown of serious medical condition categories.⁵ The Requester argues that the published

⁵See <https://www.health.pa.gov/topics/Documents/Programs/Medical%20Marijuana/Medical%20Marijuana%20Advisory%20Board%20Presentation%20Feb.%202013.%202020.pdf> (last accessed August 29, 2021).

information and statistics suggest that the Department must track the information sought in Item 2, in some manner.

In response to a request for records, “an agency shall make a good faith effort to determine if ... the agency has possession, custody or control of the record[.]” 65 P.S. § 67.901. While the RTKL does not define the term “good faith effort,” in *Uniontown Newspapers, Inc. v. Pa. Dep’t of Corr.*, the Commonwealth Court concluded that:

As part of a good faith search, the open records officer has a duty to advise all custodians of potentially responsive records about the request, and to obtain all potentially responsive records from those in possession.... When records are not in an agency’s physical possession, an open records officer has a duty to contact agents within its control, including third-party contractors.... After obtaining potentially responsive records, an agency has the duty to review the record and assess their public nature under ... the RTKL.

185 A.3d 1161, 1171-72 (Pa. Commw. Ct. 2013) (internal citations omitted); *see also Rowles v. Rice Twp.*, OOR Dkt. AP 2014-0729, 2014 PA O.O.R.D. LEXIS 602 (citing *Judicial Watch, Inc. v. United States Dep’t of Homeland Sec.*, 857 F.Supp.2d 129, 138-39 (D.D.C. 2012)). Additionally, the Commonwealth Court has held that an open records officer’s inquiry of agency members may constitute a “good faith effort” to locate records, stating that open records officers have:

a duty to inquire of [agency personnel] as to whether he or she was in the possession, custody or control of any of the ... requested emails that could be deemed public and, if so, whether the emails were, in fact, public and subject to disclosure or exemption from access by [r]equest[e]r.

Mollick v. Twp. of Worcester, 32 A.3d 859, 875 (Pa. Commw. Ct. 2011); *see also In re Silberstein*, 11 A.3d 629, 634 (Pa. Commw. Ct. 2011) (holding that it is “the open-records officer’s duty and responsibility” to both send an inquiry to agency personnel concerning a request and to determine whether to deny access).

Ms. Keefer attests that she “performed a comprehensive search” for the requested policies and procedures and determined that none exist. However, the Department’s evidence does not provide any details regarding the search, such as the types of records that were searched, what Department offices or bureaus were contacted, or if Ms. Keefer inquired with any Department officials or employees, regarding the existence of responsive records. *Cf. Hays v. Pa. State Police*, OOR Dkt. AP 2015-0193, 2015 PA O.O.R.D. LEXIS 294 (finding that a good faith search has been conducted by an agency when it “contact[ed] the Bureau most likely to possess responsive records, ... explain[ing] why that Bureau is most likely to possess those records”); *see also Moore v. Pa. Dep’t of Corr.*, No. 1638 C.D. 2017, 2017 Pa. Commw. Unpub. LEXIS 704 (finding that the agency’s evidence lacked sufficient detail “[t]o support [its] conclusion that ‘no responsive records exist within the [agency’s] custody, possession or control...”). Accordingly, the Department’s evidence regarding the non-existence of the requested Medical Marijuana Program tracking policies or procedure is conclusory. Conclusory statements are not sufficient to demonstrate that the requested records do not exist. *See Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013) (“[A] generic determination or conclusory statements are not sufficient to justify the exemption of public records”). Therefore, the Department has not met its burden of proving that records responsive to Item 2 of the Request do not exist. *See Hodges*, 29 A.3d at 1192; 65 P.S. § 67.708(a).

CONCLUSION

For the foregoing reasons, the appeal is **granted**, and the Department is required to provide all responsive records within thirty days. This Final Determination is binding on all parties. Within thirty days of the mailing date of this Final Determination, any party may appeal to the Commonwealth Court. 65 P.S. § 67.1301(a). All parties must be served with notice of the appeal.

The OOR also shall be served notice and have an opportunity to respond as per Section 1303 of the RTKL. 65 P.S. § 67.1303. However, as the quasi-judicial tribunal adjudicating this matter, the OOR is not a proper party to any appeal and should not be named as a party.⁶ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: September 2, 2021

/s/ Kelly C. Isenberg

SENIOR APPEALS OFFICER
KELLY C. ISENBERG, ESQ.

Sent to: Ed Mahon (via email only);
Christopher Gleeson, Esq. (via email only);
Lisa Keefer (via email only)

⁶ *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).